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Editor-in-Chief: VICTOR G. ROSENBLUM
Northwestern University, Evanston, Ill.

Managing Editor: JOSEPH DUCOEUR
World Center Bldg., Washington 6, D. C.

Associate Managing Editor: WILLIAM H. NEARY
2300 Republic Bank Bldg., Dallas 1, Texas

Board of Editors:

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University of Pittsburgh Law School, Pittsburgh 13, Pa.

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CHAIRMAN'S PAGE

A challenge to lawyers interested in advancing the cause of justice through the administrative process was laid down by Mr. Justice Tom C. Clark in his address to the Section of Administrative Law at the annual meeting. Mr. Justice Clark said:

> "Your Section constitutes the largest pool of 'know how' in the administrative pond. Through it you can make large contributions to the improvement of the administrative process. I therefore urge you to contribute generously of your talents to your Section. It can be the *force majeure* in this crusade."

These words of Mr. Justice Clark should inspire all of us to give more freely of our time and energy to the public service objectives of this Section during the coming year.

For the first time in many years the committee structure of the Section has been substantially revised. Our committees are now grouped under four headings: National Committees, General Committees, Special Committees, and Administrative Committees.

The four National Committees are: Administrative Law Review, Agency-Section Liaison, Association-Section Liaison, and the National Committee. This year greater emphasis is to be placed upon close, harmonious, and effective liaison with Federal agencies and with other Sections of the Association. Earl Kintner, our immediate past chairman, will serve as chairman of our Agency-Section Liaison Committee. General counsel, commissioners, and other high officials of all important regulatory commissions and departments have agreed to serve on this committee for the purpose of establishing, maintaining, and furthering liaison between our Section and the agencies they represent.

Harold Russell, a former chairman of our Section, has agreed to assume chairmanship of our new committee on Association-Section Liaison. The vice chairmen of his committee are active members of other Sections or Committees of the Association with which we desire to maintain liaison. Any proposal to the House of Delegates for Assocation action which involves the interest of other Sections will be coordinated in advance of submission. Achieving such coordination is of particular importance to our Section which crosses lines of interest of so many other Sections. It is expected

that our new committee will perform this responsibility effectively.

The other committees of the Section will pursue the type of studies heretofore undertaken by their counterparts. The General Committees will study problems common to all agencies, such as rule-making, hearing examiners, judicial review, representation before agencies, and State administrative law. The Special Committees will consider problems pertaining to specific agencies and departments. And the Administrative Committees will manage the affairs of the Section.

In his address to the Section at the annual meeting, James M. Landis—the former dean of the Harvard Law School, former chairman of several federal agencies and special advisor on administrative agencies to President-elect Kennedy—commented upon four "legends" about the administrative process, suggesting, as a friend of the independent regulatory agencies, that attention must be given to these "legends" if the administrative process is to retain its viability in the coming decade. He declared that in many cases agencies do not have the independence of action which they were expected to attain, do not demonstrate the expertise which was one of the primary reasons for their creation, and have not succeeded in reducing costs or in expediting the handling of cases at the administrative level. During the coming year our new committee on the Administrative Process, under the chairmanship of Dean Leo Huard, will study these four "legends" proposed for our consideration by Mr. Landis.

The Section of Administrative Law has a basic interest in the preservation and strengthening of the independence of our primary regulatory agencies. These agencies are, indeed, the source of most of that body of rules and principles which we describe as "administrative law." In our efforts to improve the procedures by which regulatory bodies perform their functions, we have sometimes proposed, for formal contested cases, the adaptation of rules which have proven their worth in the trial of cases before courts. For this reason our Section sometimes has been thought to advocate "judicialization" of the administrative process. This is not the case. Formal proceedings are useful only in contested cases which have all the basic attributes of court litigation.

The Section of Administrative Law does not limit its interest to cases of formal adjudication. On the contrary, the Section is concerned that there be more extensive and effective utilization by agencies of their rule-making or quasi-legislative powers. As

Mr. Justice Clark observed in his address to the Section, "too often basic continuing problems are left to *ad hoc* adjudication." Our committee on Agency Rule Making, under the chairmanship of Victor Rosenblum, will continue its work this year in this vital field, to the end that ways be found to apply with maximum effectiveness, under suitable safeguards, the legislative as well as the adjudicative powers of administrative agencies.

Since the Section of Administrative Law is a *pro bono publico* Section, there is, inevitably, a crusading spirit among its members which properly stimulates enthusiasm and activity. But this spirit should not be permitted to lead the Section to either hasty or ill-considered proposals. In concluding his address to the Section, Mr. Justice Clark said:

> "Needless to say your suggestions should be constructive. Don't join the 'wrecking crew.' * * * Only constant and careful search for meaningful improvement and modernization will eliminate the source of trouble. And so, here is a clarion call for service."

The call for service on the forty committees of our Section this year has been answered willingly and, indeed, enthusiastically by our membership. My sincere thanks to all who have responded. In this issue of the Review we are publishing, for the first time, the names of all members who have been named to our committees. There will, of course, be changes during the year. All new members of the Section will be given the opportunity, by letter from the chairman, to select a committee upon which they would like to serve and, barring some exceptional circumstances, they will be appointed to the committees of their choice. We also want every present member of the Section to participate in the work of the Section to the extent that he desires to do so. If any present member wishes to be named to a committee he is requested to advise our Secretary to that effect and we will do our best to comply with that request. I hope as many of our members as possible will find time for this never-ending task of making viable and effective the rule of law in the day to day administration of the business of government.

WHITNEY R. HARRIS, *Chairman*

ADMINISTRATIVE JUSTICE, 1960

By Hon. Tom C. Clark

Associate Justice, U.S. Supreme Court

Almost a decade and a half ago Senator Pat McCarran, co-sponsor of the Administrative Procedure Act, declared that Act to be "a comprehensive charter of private liberty and a solemn undertaking of official fairness. It is intended," he added, "as a guide to him who seeks fair play and equal rights under law, as well as to those invested with executive authority. It upholds law and yet lightens the burden of those on whom the law may impinge." About the same time the then Attorney General of the United States reported that the Act offered "a hopeful prospect of achieving reasonable uniformity and fairness in administrative procedures without at the same time interfering unduly with the efficient and economical operation of the government." This latter appraisal was from my favorite author—myself.

Since that time many words have been said, not only about the Act itself but more about the "whys" and "wherefores" of agency action under it. The vast body of law which it encompasses has developed more in the last decade than during the whole period "back certainly to the time of Henry VIII." The fact that our Supreme Court failed to classify "administrative law" as such in its indices until 30 years ago—a few months after Chief Justice Hughes took office—is indication enough that there was a paucity of cases in this category. But then came the alphabetical agencies of the thirties and now "administrative law" constitutes the largest category of cases decided on the merits. This is entirely understandable if one but ponders over the length of the administrative arm extending not only into every business enterprise but into the daily life of every citizen. Like the dew it covers America from its seashores to its highest peaks blanketing over 170 million souls. It is not surprising, with so many toes stepped upon, that as my brother Judge Prettyman has said, administrative law is now "the most important body of law presently current and reasonably foreseeable."

We must consider the far-reaching problems that face the administrators of this Act. It is well that we consider them while the vast body of administrative law is in a fluid state lest it become

so "unruly" that its headaches be legislatively remedied by amputation rather than emendation. Admittedly, like teenage people, administrative agencies have lived long enough to develop bad habits and to indulge in some unseemly conduct as well as injudicious action. But any family with some 60 children of all ages, sizes and descriptions would experience some bedlam. Recently two of our grandchildren returned to their Texas home and I must admit that during their two weeks' visit with us there was some exasperation. Like my brother Reed and his grandchildren, "I was the most happy feller when they arrived, but after only two weeks I was the most happy feller when they departed." We hope that the habit of being spoiled while with us can be eradicated quickly by their parents. In the same manner the Bar has a responsibility to bring about a change in the bad habits of the administrative agencies. This duty, like our other obligations, is the pride yet the yoke of our great profession. But we proudly wear it as a badge of distinction.

The American Bar Association began its program of improvement in the administrative process in 1931. A decade later the District of Columbia Bar, under the leadership of its then President and my brother Judge Barrett Prettyman, organized its administrative section. It can be said without doubt and with great pride that these forces within the Bar brought about the enactment of the Administrative Procedure Act of 1946.

However, as my favorite author pointed out in the "Introduction" to the Attorney General's Manual on the Act, issued August 27, 1947, "it became evident that a major phase of our work had just begun." The Congress had not included in the Act any authorization for an Office of Federal Administrative Procedure which had been recommended by the Attorney General's Committee back in 1941. The task of coordination and improvement was left unassigned. Naturally the agencies—despite the Attorney General's Manual—began to give the Act as many phases as the moon. We must think and plan long ahead lest we be sure to find trouble at our door. This we did not do. The Act failed to blossom on its own. At least those blossoms that did appear failed to do more than flower. For this, however, we have only ourselves to blame. Hybridism in governmental processes, like in plant or animal life, attains heterosis only after painstaking nurture. From a functional standpoint the administrative agency is a hybrid. As my leader in the field, Brother Prettyman, tagged

them, they are "part elephant, part jack rabbit and part field lark." Indeed, President Roosevelt, in transmitting the Report of his Committee on Administrative Management to the Congress in 1937, stated that the creation of administrative agencies "threatens to develop a fourth branch of the Government for which there is no sanction in the Constitution." Be this as it may, the agencies have performed a service that could not be performed alone by any of the three recognized branches of the Government. My study of a large number of agency cases leads me to say that by and large the agencies recognize that their sole function is the administration of law. True, some of their expedients show little resemblance to judicious procedure, but we must consider them as a whole—not in isolation. There is one thing we can put to one side for sure. It, as my brother Judge Henry Friendly says, is "the idea that we can overcome the difficulties of the administrative agencies by abolishing or even seriously curtailing the amount of regulation." Some say adjudication should be placed in administrative courts. But, as Chief Justice Stone once said, this is "reminiscent of the distrust of equity displayed by the common law judges and of their resistance to its expansion." I have no "truck" with that proposal. Nor do I take to the suggestion that the prosecutive function be placed in the Department of Justice. I am one who believes that present habits as well as bad procedural behavior of the agencies can be largely corrected within the present statutory framework. Let us examine the problem for a moment.

As early as 1951, Dean Pound gave an interesting lecture on his distrust of administrative agencies. It might be summed up in his single sentence: "Perhaps the most serious [criticism] is a tendency to decide without a hearing, or without hearing one of the parties, or by a mere appearance of a hearing—going through the appearance of one, the results having been predetermined." This is a serious charge. However, I do not recollect any case coming to us on that point. If one does—and the record gives it support—I have no doubt as to what our action would be. Moreover, such a practice could be corrected by the agency itself and, therefore, boils down to personnel selection rather than inherent fault in the administrative system. A more current criticism is delay in adjudication. Surely this is valid. As I pointed out last year in an opinion involving the Natural Gas Act, review by the Federal Power Commission of initial certificated rates "appears

nigh interminable." In argument only last Term it was admitted that, although the Court decided back in 1954 that the Commission had jurisdiction in such cases, none had reached decision. It is only fair to say, however, that thousands and thousands of proceedings are on file. No court could process them more quickly. The same, I am sure, may be said with regard to the case-load of other agencies. The agencies must correct it.

Another suggested "bad habit" is the size of the record. I thoroughly agree that the records sometimes include "everything but the kitchen sink." I have written several opinions in which the records have run into thousands of pages. However, in this connection, as I read these records, it looks as if the lawyers may be more at fault than the bureaucrats. But in any event the agencies themselves can easily remedy the situation.

Procrastination on over-all policy determinations is another "cry" against present administrative procedures. It is true that too often basic continuing problems are not decided but are left to *ad hoc* adjudication. This gives industry no "guidelines" and results in confusion. Certainly this must be corrected by agency action. I would say, in this regard, that a greater fault is the prosecution of picayune cases. A Term never passes but that we get some agency case which discretion says never should have been brought, but which some over-zealous attorney has taken on as a pet project.

Perhaps the best known "cracks" at the agencies are on "payola." This is a sad practice but, again, personnel selection would quickly put an end to it. In the meanwhile statutory sanctions might be in order.

One of the causes of dissatisfaction with the agencies is that they are wanting for attention from the Bar. In this regard it seems providential that recent as well as contemplated action by the President himself affords this Section an exceptional opportunity to continue its service in the improvement of administrative procedures. As you know, in 1953 the President created the President's Conference on Administrative Procedure. Under the Chairmanship of Judge Prettyman a large group of representatives, including some of my readers, made extensive studies of several aspects of administrative procedures. In March 1955 the President accepted the Conference Report expressing the necessity for a continuation of such efforts. The Report was made available to Congress. Meanwhile, Congressman Oren Harris, Chairman of

the "Oversight" Subcommittee of the House Committee on Interstate and Foreign Commerce, created an Advisory Council of representatives of six of the independent agencies. It carried on a study somewhat along the line of the President's Conference and made an Interim Report in February 1960. This Report recognized that the situation required a more comprehensive and permanent organization than the Advisory Council. In the Senate a proposal was advanced by Senator Keating for the creation of a National Advisory Committee on Administrative Practice and Procedure, but it appears that nothing has come of it. And now President Eisenhower has called a second Conference on Administrative Procedures. Among its purposes would be consideration of the desirability of establishing a permanent, continuing Presidential Conference or Committee. It would function along the broad lines of the various Federal Rules Committees recently appointed by the Chief Justice on behalf of the Judicial Conference of the United States. Its personnel would include private practitioners in the administrative field. This is where you come in!

As I see it, this Conference gives promise of the greatest improvement in "trial by agency" since the adoption of the Administrative Procedure Act. While I shall not undertake to make a blueprint for Conference action, there are some pressing areas that need immediate attention.

First, some uniformity in rules of procedure is admittedly desirable. The President's first Conference made some excellent recommendations in this area. These should be reappraised and supplemented where necessary. Second, is the inexorable delay present in most of the agencies. This is, of course, likewise true in the courts but that is no excuse. The Conference must work out expedition programs whether this be in some form of pre-trial or otherwise. Third, the administrative process can be no better than its administrators. The status of the government lawyer, the Commissioner and the Hearing Examiner must be improved. In addition, attention must be given to personnel appointment, qualifications, pay and related problems in the agency as well as with regard to the hearing examiners. Fourth, canons of ethics must be formulated not only for agency personnel but likewise for the private practitioner. Over nine years ago, in a talk before the Administrative Section of the District of Columbia Bar, I (my favorite author again) recommended that action should be taken

in this area and standards provided. This is one of the most pressing problems and should receive priority in attention. Fifth, the expense of litigation, size of the record, adjournment of a case for hearing in several different cities and localities and more care in the selection of cases for prosecution should receive attention. Interlocutory appeals within the agency for the purpose of delay should be dealt a death blow either by rule or hearing by one member of the Board or a Commissioner. Likewise judicial review must be expedited. The Section of Judicial Administration presently has a committee under the chairmanship of John Lynham, Esq., working on the problem. Perhaps the use of pre-trial techniques which I understand are used in the Court of Appeals in the District of Columbia might be utilized. Moreover, the printed record can be enormously reduced by the exchange of briefs prior to designation of the record and its printing. This, too, is standard practice in the Court of Appeals here. I repeat, these are only a few suggestions made at random by one not possessing your "expertise."

I have a feeling, however, that a Permanent Conference or Committee would be a signal advance in the effort to improve the administrative process. I hope that the President's Conference, when called, will recommend its continuance as such. Much needs to be done to correlate what we already know and to learn what we need to know. Your Section constitutes the largest pool of "know how" in the administrative pond. Through it you can make large contributions to the improvement of the administrative process. I therefore urge you to contribute generously of your talents to your Section. It can be the *force majeure* in this crusade. The impact of administrative decisions extends far beyond the borders of your community. Contributions should come from every part of the Nation and be correlated by the Conference. Washington lawyers—like Supreme Court Justices—have no Olympian infallibility. Ideas are sometimes born in parts of the country other than here. Needless to say your suggestions should be constructive. Don't join the "wrecking crew." Every person—including the lawyer—has a constitutional right to "cuss" the decision against him (and I often indulged in it as a tranquilizer when in the practice) but it never changes the result. Only constant and careful search for meaningful improvement and modernization will eliminate the source of the trouble. And so, here is a clarion call for service.

SOME OVERLOOKED ESSENTIALS OF ADMINISTRATIVE REGULATION

By Hon. Oren Harris

Chairman, House Committee on Interstate and Foreign Commerce

As Chairman of the Committee on Interstate and Foreign Commerce and of the Special Subcommittee on Legislative Oversight, I have had in recent years frequent occasion to concern myself with the administrative law which governs the so-called "big six" independent regulatory agencies. I am, of course, speaking of the Civil Aeronautics Board, the Interstate Commerce Commission, the Federal Communications Commission, the Federal Trade Commission, the Federal Power Commission, and the Securities and Exchange Commission, which through their licensing and other powers delegated by Congress exercise regulatory control of the air, rail, and motor transportation industries, the communications industry, the interstate electric power and natural gas industries, the Nation's security exchanges and security issuing practices, and the trade practices of otherwise unregulated companies.

For a proper understanding of the regulatory processes of these six agencies, it is essential, in my opinion, to keep in mind one basic concept. In formulating the statutes administered by these agencies Congress attempted to reconcile the necessities of the general welfare with the rights of private individuals. In this endeavor Congress left as much as possible of the decision-making to the regulated industries.

In other words, Congress did not give these agencies a blank check mandate to develop a national plan for each of the industries under their jurisdiction, but left the initiative to the individual enterprises which make up the several regulated industries.

The underlying theory has been—and let me emphasize this—the theory continues to be—that in this way the sum total of initiative, ingenuity, productivity, and economy of operations of each of these industrial units will exceed by far what each unit would contribute if it were to operate under a centralized national plan.

That, it seems to me, is the fundamental element which many critics of the independent regulatory agencies appear to have missed. These critics view the policymaking function of the regu-

latory agencies as a mandate for the development of a national plan for each of the regulated industries. These critics propose to transfer this planning function to existing or new executive departments.

I would like to point out that you cannot transfer this function from the regulatory agencies because it was never given to these agencies by Congress in the first place. If Congress should ever invest central planning authority in executive departments, it would necessitate the granting of new regulatory authority. It would not merely be a transfer of power from the regulatory agencies to the executive departments. This underlying factor, according to my view, is one of the essentials of our present-day administrative law in the United States.

Our concept of business regulation is for Congress to attempt to lay down by law the regulatory policies which the agencies are to follow. I think we still believe in the concept of business regulation by law and not by commissioners or board members.

It is appropriate at this point to recall the words of Judge Prettyman, in his lectures on "Trial by Agency" at the University of Virginia Law School:

> ". . . If the American people were to reach the conclusion that the operation of these governmental agencies is something other than the administration of law, that the agencies are means for government other than by law, then the system of agencies would be doomed. The American people are of a multiplicity of minds on many matters, but on a few subjects they are in unanimous agreement and their views are as fixed as reinforced concrete. One of the fixations is that government must be by law. We will not tolerate government by men only. We will have government by law whether or not we have administrative agencies."

I am the first to admit that Congress has not always been successful in accomplishing this objective of laying down specific legislative policies for the agencies to follow. The failure of Congress to do so has provided ground for the criticism that these agencies are a "headless fourth branch" of government and are operating in a vacuum, and that agency decisions are based on the length of the administrator's foot.

I feel very strongly that if our system of business regulation through independent regulatory agencies is to continue, Congress will have a lot of catching up to do with regard to the spelling out of up-to-date and specific policies which the agencies are to follow.

If Congress delays this determination or if it finds that it cannot set forth regulatory policies with sufficient definiteness, then, indeed, the days of the independent regulatory agencies may well be numbered.

Let me make clear the kind of congressional homework I have in mind. I can best do this by giving you an example. Under the Communications Act of 1934, broadcast licenses are granted without charge. The only requirement which licensees must meet is that they operate their stations in the public interest. Now the investigations of the Legislative Oversight Subcommittee have shown that in a number of proceedings in which competing applicants sought to secure television licenses, ex parte communications were made by or on behalf of the applicants to members of the Commission. These proceedings and decisions were supposedly entirely on the record.

The disclosures made at the Legislative Oversight Subcommittee hearings have resulted in judicial condemnation of such extra-record representations and the formulation of legislation to prevent its recurrence. This proposed legislation is aimed chiefly at necessary reforms in procedural law applicable to the big six regulatory commissions. Provision is made to outlaw ex parte or extra-record presentations in those proceedings which by law or agency rule are supposed to be conducted "on the record."

But improvement in the administrative process, so that it can keep pace with our accelerated economic development, calls for more than procedural reforms. There must be changes in the substantive law. For instance, billions are now being invested annually in so-called mutual funds. This was a form of investment virtually unheard of in the 1930's when our securities acts were adopted. Similarly, increased trafficking in broadcast licenses, the swift growth of the economic and social power of the networks, the rise of new modes of transportation, and the development of new means for the manufacture and distribution of electrical and other energy—to name only a few examples—all call for a reappraisal of the adequacy of the existing organic regulatory laws.

In my view we should explore the need for substantive law changes in the administrative process on a systematic agency-by-agency and problem-by-problem basis.

In the formulation of the appropriate measures which should be undertaken the members of the Boards and Commissions should assume a more active role in presenting recommendations

to Congress. As I see it, one of the deficiencies of the regulatory agencies during the past decade has been their failure to assist the Congress properly in recommending basic changes in the laws they administer which are necessary to meet new developments in the industries subject to their regulation and which are desirable to make more specific legislative policies which have been expressed only in general terms.

Communications between the Congress and the agencies have unfortunately largely been one-way communications and the agencies have failed to engage in the all-important "feed back" which management experts consider indispensable to the proper exercise of delegated authority. The benefit of commission "expertise" should be extended to the legislative policy formation process and should not be reserved exclusively for matters coming within the administrative or quasi-judicial sphere.

Before concluding these remarks I would like to mention another fundamental aspect of the administrative process of equal or perhaps greater significance than improvements of procedural and substantive law. It is the qualifications which should be possessed by the administrators themselves. Much as we all desire law reform, we must recognize the limits of effective legal action.

Regulatory laws cannot be made self-executing. The primary reason for government by commission is the necessity of congressional delegation of power to persons of expertness in the areas they are called upon to regulate.

What can we do to make more certain that the regulatory agencies are manned by persons of requisite character and ability? Lengthening the terms of office, increasing salaries and retirement benefits would be good steps towards attracting men of greater capabilities and independence than are now available. Congress can take these steps.

But it remains the responsibility of the President to make certain that the nominations he sends to the Senate are of men selected on the basis of their ability and desire to administer the regulatory laws. It is the responsibility of the Senate to scrutinize the nominations to make certain that this is truly the case. No matter how good the law, it can be nullified by an ineffectual administrator.

These observations are by no means intended to reflect upon the character and ability of numerous incumbents who have rendered and are still rendering dedicated service in their appointed offices.

Members of the Bar have, of course, been primarily concerned

with the procedural aspects of the Federal administrative process. As a legislator and as a student of that process, I feel impelled to re-emphasize the need for better and more specific formulation of regulatory policy and improving the caliber of the men who are serving on these agencies.

It is my conviction that these two latter aspects require at least an equal degree of attention as the procedures followed by the independent regulatory agencies.

Unless all three aspects are given proper attention I fear the development of these agencies during the next decade is not going to be along very constructive lines.

THE ADMINISTRATIVE PROCESS—THE THIRD DECADE

By James M. Landis

For some thirty-five years now I have had the opportunity to defend and to criticize our administrative agencies as a teacher, as a member of many of these agencies and as a practitioner before them. To add up the result of these experiences is not an easy task, particularly if one seeks to be objective about a host of subjective experiences.

The administrative process, and I prefer to call it that rather than administrative law for reasons that I trust will become apparent, seems to me during these past three decades to have passed through two stages and is now entering a third. To understand that process, and lawyers today as distinguished from the bar of the twenties have necessarily a greater familiarity with it, it seems essential to define the contours of the area covered by this discussion. Administration is, of course, a broad term, spanning everything from the enforcement of weights and measures to the expansion and contraction of the currency of the country. Administrative law, on the other hand, tends to narrow the field to a concept that centers about the adjudication of claims by agencies other than courts. The adjudication of these claims may be resolved through a process not unlike that pursued by our courts. They may, however, be resolved also by a process wholly dissimilar to that of litigation. The promulgation of zoning regulations by a town board, for example, is essentially an adjudication of conflicting claims to the use of land, the resolution of which must be held within certain broad precedents and which can be set aside by judicial action if it oversteps them. This phase of what might be called administrative law rarely receives attention from students of the subject. No suggestion, for example, has ever been made to my knowledge that the process of adjudication in this important area should be judicialized in the sense that ex parte approaches between the client and the "judge" should be outlawed or that the ultimate decision must find its basis in evidence of record rather than in the experiences, imagination or prejudices of those that have the power to choose between the many alternatives presented to them. And yet rulings in this area of land use frequently have greater economic and social

consequences than many a decision of one of our more important independent regulatory agencies. The area that we generally have in mind when we speak of administrative law and the administrative process is the work of agencies entrusted with the development and enforcement of important statutes, the scope and impact of which could only be indefinitely determined at the time of their passage and the development of which by regulation and adjudication was left in the hands of an agency not required to be manned by men trained in the law.

It is for this reason that most of these agencies, but not all, were constituted on a bi-partisan basis and were sought to be made what we call "independent" by the assurance of some degree of tenure—an assurance that was rudely disturbed by the Supreme Court of the United States in *Myers* v. *United States,*[1] only to be restored by its later decisions in Humphrey's case, *Rathbun* v. *United States,*[2] and in *Wiener* v. *United States.*[3] Similarly, since the further development of these statutes was definitely contemplated by the legislature, it was believed that the legal discipline as exemplified by our courts was too narrow for such a task and that other disciplines should be available to discharge this important responsibility. The Federal Trade Commission was to become a "businessman's court." The Interstate Commerce Commission had had an illustrious career under the lay leadership of Joseph B. Eastman, and leadership such as this representing a discipline other than law appeared to have important advantages.

These were the general considerations that molded the form of administrative agencies at the time of their burgeoning under the New Deal. The very failure of the National Recovery Administration with its monolithic structure to set a suitable and enduring pattern for industry and labor gave impetus to these conceptions. With its demise, the National Labor Relations Board came into existence, and some of its other responsibilities, it was hoped, would be undertaken by the Federal Trade Commission.

Of course, the growth of the administrative process during the thirties, we can now recognize, was essential for the advancement of the philosophies of the New Deal. It was believed that claims of the type that the government was now willing to recognize could not be effectively pressed by the method of private litigation available in the courts. Claims relating to the safety of bank deposits,

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[1] 272 U.S. 52 (1926).
[2] 295 U.S. 602 (1935).
[3] 357 U.S. 349 (1958).

to the protection of investors sadly deluded by the experience of the twenties, to freedom from discrimination in employment, to the right to bargain collectively, to the use for commercial purposes of our air lanes in interstate commerce, are samples of claims for which the judicial process had developed no adequate remedies.

This burgeoning of the administrative process represents the first phase of our last three decades. It was met with opposition by a goodly portion of the American bar. Scholars, distinguished lawyers and others, such as Dean Roscoe Pound and the late Judge Vanderbilt, inveighed against it.[4] Much of this opposition stemmed from a basic antipathy to the philosophy of the New Deal. Some sprang from the resentment of the legal profession to giving responsibility for the adjudication of claims to persons untrained in the law. Not a little stemmed from older practitioners unfamiliar with the nature of the administrative process and unwilling to relearn what years of experience and patient study had taught them about the workings of courts.

This was the period, too, of important judicial decisions, the effects of which tended to impede the progress of the administrative process. In the thirties we had important Supreme Court cases limiting the right of Congress to delegate power to the administrative agencies [5] and calling for courts to make independent findings on facts entrusted to the administrative agencies.[6] The issues of fact presented constitutional issues that could only be resolved by judges, the Court maintained.

This era now appears to be over. Although important cases dealing with administrative action still come before the courts and particular actions of administrative agencies are not infrequently reversed, none of the cases, not even the *Chenery* cases,[7] have dealt what might be called crippling blows to the administrative process. Their purport has been rather to compel administrative agencies to live up to pretensions that even the courts have felt they do and should process.

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[4] See, *e.g.*, Pound, *For the "Minority Report,"* 27 A.B.A.J. 664 (1941); Pound, *The Challenge of the Administrative Process,* 30 A.B.A.J. 121 (1944); Vanderbilt, *The Place of the Administrative Tribunal in Our Legal System,* 24 A.B.A.J. 267 (1938).

[5] Panama Refining Co. v. Ryan, 293 U.S. 388 (1935); Schecter Poultry Corp. v. United States, 295 U.S. 495 (1935).

[6] See Crowell v. Benson, 285 U.S. 22 (1932); St. Joseph Stockyards Co. v. United States, 298 U.S. 38 (1936); Jones v. SEC, 298 U.S. 1 (1936) was an illustration of a judicially imposed restriction on the agency's exposure to public view of an effort to defraud the public.

[7] 318 U.S. 80 (1943); 332 U.S. 194 (1947).

Similarly there has been a marked change in the attitude of the bar. After a decade of the New Deal most of the bar that had been in opposition to the growth of the administrative process felt that a roll-back of the achievements of the New Deal or of the manner utilized to recognize through the administrative process the multitude of claims that it had sponsored was neither possible nor desirable. There was a short upsurge for a time with the introduction of the original Walter-Logan bill.[8] But wiser heads prevailed on both sides. With the able Attorney-General's report in 1941,[9] the attention of both sides was directed towards the improvement rather than the contraction of the administrative process.

This is what I choose to call the second phase of the last three decades. Its direction has been primarily procedural. Its first culmination is to be seen in the Administrative Procedure Act of 1946.[10] The gains achieved by that Act are apparent; its deficiencies are equally apparent. Consequently the drive to improve administrative procedures still continues. It is found in activities such as the reports of the Hoover Commission, the work of the American Bar Association and the Association of the Bar of the City of New York, and the studies and recommendations of the President's Conference on Administrative Procedure. All these are significant and, despite such differences as members of the various organizations may have, this work should be continued with vigor. Particularly important, for example, is the necessity for coordinating the procedures of our various agencies through an Office of Administrative Procedure comparable to that of the administrative office of the federal judiciary, and the strengthening of the stature, tenure and independence of the hearing examiners.

Now, however, a third stage in administrative development seems to be taking place. Its rumblings have been apparent for some time. Some of them have now been brought to light by the work of the House Sub-committee on Legislative Oversight.[11] We are or at least we should be examining the truth of certain legends

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[8] See H.DOC. 986, 76th Cong., 3d Sess. (1940). See Landis, *Crucial Issues in Administrative Law,* 53 Harv. L. Rev. 1077 (1940) for comment on the A.B.A. sponsored bill.

[9] U.S. Attorney General's Comm. on Administrative Procedure, *Final Report—Administrative Procedure in Government Agencies,* S.DOC. No. 8, 77th Cong., 1st Sess. (1941).

[10] 60 STAT. 237 (1946).

[11] House Sub-comm. on Legislative Oversight, *Investigation of Regulatory Commissions and Agencies,* H.R. REP. No. 1258, 86th Cong., 2d Sess. (1960).

that during these years have been built up about the administrative process. Let me name some of them.

The first of these is the legend of its possession of "expertise." It was a nice word for the defenders of the administrative process and it had value in demonstrating to the judiciary, generally unfamiliar with the economics of a particular problem, that the solution of that problem, if at all reasonable, should be left to persons who were presumably familiar with it. It probably had merit in the days when Judge Cooley, Commissioners Eastman and Mahaffey sat on the Interstate Commerce Commission. It may have considerable merit today in many specific situations. But on the whole does it exist? It exists obviously in the staffs of many of our agencies. But at the top level, where the responsibility of decision rests, one cannot be too sure.

I can recall an observation of Mr. Justice Brandeis, when I worked for him as a clerk, to the effect that, however much one could criticize the Supreme Court of the United States, it endured and deserved its place in our political structure because it did its own work. How true is this of our administrative agencies? I have heretofore criticized not only the manner in which some agencies made findings of fact and conclusions of law without any articulate rationalization between the two, but, more importantly, my criticism has gone to the practice generally current of hiding responsibility for agency decisions behind *per curiam* opinions.[12] Many of our agencies, for example, have opinion writing sections. The decision of the agency is communicated to this section and work on the formulation of a rationale that will support that decision is undertaken. But the process of decision is not always capable of delegation. Had the Supreme Court of the United States followed this practice of our administrative agencies, we would through anonymity have missed the majesty of a Marshall, the sprightliness of a Holmes, or the grave sincerity of a Brandeis.

This practice more than anything else has, I believe, resulted in the lack of development of adequate standards in various administrative fields. I refer, for example, to the lack of any true standards in the choice between competing applicants for a television or radio channel and in the choice between competitors for an airline route. These choices are made and have to be made but the bases upon which they rest are incapable of being accurately briefed.

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12 See Landis, THE ADMINISTRATIVE PROCESS 105 (1938).

From the practitioner's standpoint, this practice also presents a problem. Obviously in presenting his case, he tries to do the best he can for his client. Phrases in his brief are carefully chosen, authorities selected with discrimination, but he has no assurance that his efforts will find their way to any individual truly responsible for decision. His efforts will hopefully reach the opinion writing section, but who that section is and whether his arguments arrive too late, who can say? Indeed, when I was a member of the Civil Aeronautics Board, it was the practice for the staff to prepare a shortened précis of the briefs of counsel so as to obviate the necessity for the members to read them.

How to correct this situation is not easy. The central tragedy of life, as Emerson observed, is that there are only twenty-four hours in a day. Commissioners are busy men. Moreover, many of them come from professions and businesses unattuned to the idea of articulating conclusions. Some of my past colleagues, whose judgment I always respected, could not conceivably have set forth the grounds for their conclusions and yet the soundness of these conclusions could not be questioned. Law, however, is not built this way. It is not a forest of isolated pillars but an edifice built stone by stone.

Any examination of this legend of expertise must also take into consideration the manner in which appointments are made to administrative agencies. With reference to judicial appointments, however good or however bad they may be, we do have an assurance that they have been exposed to one discipline, that of the law. Generally speaking, the degree of that exposure can be examined and fairly well measured. But with administrative appointments, for reasons that I earlier advanced, a single discipline is not required. But a discipline that has some relationship to the responsibilities to be assumed should be required. Too often this has not been insisted upon and without such insistence the claim to expertise has slight merit. Insufficient study has heretofore characterized this problem of administrative appointments. It calls, however, for treatment substantially similar to the matter of judicial selection in which the bar in the last few decades has made significant progress.

A second legend revolves about the theory of independence. With reference to the executive, considerable question attaches to that theory. Recently the powers of the chairmen of many of

our agencies have been significantly expanded and the designation of the chairman on an annual basis given to the executive. There is much to be said for this change since the broad policy pursued by the agencies should fall in line with that of the Administration as a whole. However, the question of tenure is another story. Terms are short, generally five years, and a policy against reappointment seems to have come into being. This situation is enhanced by the fact that due to the rapid turnover many appointments are made for the balance of an unexpired term, consequently shortening what in itself is a short tenure. Indeed, the rapid turnover at the top levels of our administrative agencies presents a serious problem. It means fundamentally that service in these posts is not regarded as a career but as a stepping stone to some other position in government or industry. It follows naturally that the type of expertise resulting from experience is not developed, and, more serious, the devotion that arises out of the conception of a lifetime of concern is missing.

This simple factor of devotion, I suggest, is important. Apart from the adjudication of controversies, an immensely significant area of the administrator's work lies in the field of shaping policy by regulation and by the direction of the efforts of his staff. Perhaps one of the largest worries over the work of our administrative agencies has been their lack of creative thinking. Transportation, for example, in all its phases has altered greatly from what we thought its significant problems were in 1920. Yet the creative thinking of our various administrative agencies has failed to anticipate problems that could have and should have been seen a decade ago. No effort to coordinate the various aspects of transportation, all of which overlap each other, has been made. Creative leadership in this field has not evolved from our administrative agencies and probably calls for some type of reorganization that would stress the planning function of these agencies.

The agency's independent status vis-a-vis the legislature is also questionable. In the first instance it has to deal with its budgetary problems before committees of the House and the Senate, and these problems are vital to the efficient exercise of its powers. Congressional committees frequently attempt through the withholding of funds, to influence both the rule-making and the adjudicatory processes of the agencies. Secondly, committees of Congress have on occasion directly intervened in their operation. Only a short time ago we saw the extraordinary spectacle of a committee of the

Congress seeking to tell the Federal Communications Commission not to handle a proposed rule change pending before that Commission which the Commission had already concluded was within its jurisdiction to consider.

Of *ex parte* contacts between legislators and agency members, too little has yet been told. Let me, however, quote from the hearings on Senate Bill No. 2374,[13] designed to outlaw *ex parte* approaches to agency members and hearing examiners in adversary proceedings. The reaction of the senior Senator from Illinois to this proposal advanced by the American Bar Association is to be found in this excerpt from his colloquy with the Association's Chairman of its Special Committee on the Federal Administrative Procedure Act:

> "Senator Dirksen. Ever since 1933, when I came here as a freshman Congressman, I have been calling every agency in Government in the interest of my constituents. I expect I am going to continue to do it whether this becomes law or not, and I am afraid this bill is not going to become law with my sanction, because I don't go that far.
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> "I make the case just as clear as crystal, so the whole world may know. But now let's get the specific examples. There is an airline, let us say X, based in Chicago. I know the president and all the personnel and a good many of the pilots. There is another airline based in Missouri, my neighboring State. I don't know very much about it. But there is a petition or an application pending before CAB, and they both want to be certified for a stop in Iowa, so I call up the Chairman of the CAB and I say: 'Look, Mr. ———, X Airlines has an application pending. I know these people, they are good, reliable operators; they are good solid citizens. I just want to know what the status of the matter is.' "

This attitude is not unusual, but it hardly assumes that degree of independence on the part of the administrative agency that one might otherwise surmise.

A third legend or hope that has surrounded the administrative process is that it would supplant in some respect the costliness of litigation in our courts. It is true that in a number of situations the government undertakes the cost of prosecuting a remedy which theretofore could only have been pursued at considerable expense by an individual generally unable to bear these costs. But in the disposition of adversary proceedings between private claimants,

[13] S.2374, 86th Cong., 1st Sess. (1959).

such as airline route cases or applications for television frequencies, the costs remain high. How to deal with this problem is not easy. But costs have a relationship to the length of the proceeding, and here a strengthening of our evidentiary rules would be of help. By this I do not mean the adoption of rules of evidence applicable to a jury trial. But the length of administrative records due to the inclusion of material of substantially no probative value at a dollar or so a page means much to a claimant whose resources are not inexhaustible. It means also that these huge records have little chance of personal examination by the members when they are called upon to review the findings of a trial examiner. I can recall an essentially small air line route case where the costs exceeded $150,000; an effort to bring about a rule change before the Federal Communications Commission, substantially unsuccessful, on which some $200,000 was spent; an interposition in a merger proceeding where the costs, not including any fees to counsel or to other experts, ran up to $35,000. These are proceedings that the average businessman or entrepreneur simply cannot afford.

A fourth legend, and this is the last with which I shall deal, is that of expeditiousness. This was certainly a hope entertained in the thirties. Its validity today is subject to serious question. Judge Henry Friendly, of the Second Circuit Court of Appeals, and Mr. Louis J. Hector have recently called our attention to proceedings that have been protracted for five and even ten years, when their rapid solution from the standpoint of the industry and the public was imperative.[14] Unfortunately these situations are not rare. These delays stem from several factors, some of which are curable. I have already mentioned the too casual attitude towards the admission of evidence. This can be enhanced considerably by the not infrequent attitude of government counsel not merely to prove his case but to insist upon proving it four times over. Other counsel, representing interests with large resources, can resort too easily to delaying tactics. The authority of the hearing examiner is often too meager to deal with situations such as these. Settlements are difficult to bring about since the stakes are high. An appeal from the hearing examiner is always available and is almost necessary due to the fact that the findings are required to be made

[14] See Friendly, *A Look at the Federal Administrative Agencies,* 60 Colum. L. Rev. 429 (1960); Hector, *The New Critique of the Regulatory Agency,* 12 Ad. Law Bull. 12 (1959); Hector, *Problems of the CAB and the Independent Regulatory Commissions,* 69 Yale L. J. 931 (1960).

by the agency itself. Some type of appellate procedure equivalent to *certiorari* might be devised for many administrative adjudications. There is also the constant overhanging problem of inadequacy of personnel, both in quantity and quality, which has its source in budget limitations. The Securities and Exchange Commission, for example, in its Division of Corporation and Finance, is called upon to handle today more than three times as many 1933 Securities Act registrations than it had to handle in a comparable period in 1950, with no increase in its staff. The statutory waiting period of 20 days has been lengthened due to enforced administrative delays to 40, to 60, and even to 90 days, raising serious questions of the character and terms of underwritings that are now available. This problem of budget procedures is too complex for me to attempt to discuss here, but its consequences to the efficacy of the administrative process are serious.

I have enumerated these legends or problems as those that seem to me to be the opening of a third phase of the relationship of the legal profession to the administrative process. I mention them as a friend and not a foe of that process. Today it is inextricably woven into our way of life and it promises to grow rather than diminish. Civil rights, for example, is likely to bring an essentially new and large field under the control of the administrative process.

The major issues of the next decade or two seem to me to center on those I have here outlined. A consideration of them by the bar in a spirit of helpfulness rather than resentment will mean much to their solution. But other disciplines must also become involved, for we must remember that this is not merely a government of laws but a government of laws by men, and no profession, no discipline, can insist upon a monopoly of these men. The bar, however, still has the confidence of our people and in the discharge of that responsibility its talents should be made available to make the administrative process a way of justice, quick, sure and fair.

RECENT TRENDS IN THE ADMINISTRATIVE PROCESS IN ENGLAND

By Dr. H. W. R. Wade

Reader in English Law, Cambridge University, England

American administrative lawyers are prone to think that in England the subject is still in a state of primeval simplicity: no written constitution, no Supreme Court to invalidate statutes, no written guarantee of due process, no substantial evidence rule—and not even any independent regulatory commissions. I can well understand that you may want to class us with the underdeveloped countries. Nevertheless, we face exactly the same problem: how to reconcile the enormous powers proliferated in the modern state with the ideals of fair decision and just procedure which lawyers must always cherish and fight for. A whole new set of administrative problems have arrived in the wake of the welfare state, which in England is now supposed to care for us from the cradle to the grave, or, if you prefer the more accurate and also more poetical version, from the womb to the tomb.

The social revolution which received such impetus from the Second World War has made us realize the administrative lawyers have some very important questions to answer. In explaining what has been happening lately I am not going to offer any apologies, for we have been through a period of reforming activity of which I think we have no reason to be ashamed. Although I do not suggest that England can teach America anything about the ideals and principles which should underlie public administration, nevertheless I hope you will find our own experiments interesting.

Lawyers who were in London in 1957 will remember that the Report of the Franks Committee had just appeared, and that Sir Oliver Franks himself addressed one of your meetings. The fact that he was chairman of the Committee investigating the proceedings of statutory tribunals and inquiries served to show that it was not primarily a legal committee. Perhaps I need not remind my readers that he was a professional philosopher, head of an Oxford College, then Ambassador here in Washington, and is now head of one of the biggest British banks. One is tempted to say that the law is one of the few professions that he has not adorned. It is true that in England we have a great belief in the amateur, and

when we set up Royal Commissions and Committees we think that the right place for the specialist is on the witness stand rather than behind the table. But there was a further significance in the appointment of laymen as Chairman and as the majority of members of the Franks Committee. The object was to bring the ordinary citizen's ideas of justice and fair play to bear on a complicated field of administration. No one could then say that the Committee's recommendations were mere lawyers' shibboleths, which the legal profession was trying to project out of their own proper sphere into the foreign territory of administration. Instead of talking about audi alteram partem, the scope of certiorari and the need for wider use of mandamus, the Committee talked about openness, fairness and impartiality—things that every one could understand. There are, indeed, occasions for applying Gibbon's celebrated remark that some things are best concealed in the decent obscurity of a learned language. No doubt he was right in applying it to the vices of the Empress Theodora. But it did not apply to the Franks Committee, and the success which the Report has had with the government, with Parliament and with public opinion was certainly due, to some extent, to the fact that it faithfully reflected, in ordinary language, the feeling for justice which is deeply implanted in the ordinary citizen.

Now what was it all about? And what actually happened? The Report dealt with two different subjects, tribunals and inquiries, and the Act of Parliament which turned some of the recommendations into law emerged finally as the Tribunals and Inquiries Act, 1958. I say "some of the recommendations" not because action was taken only on a few of them, but because many of them could be put into effect by changes in administrative procedure without the aid of statute, and others by making new regulations under existing statutes. Others, also, needed further consideration before action could be taken. And when I say that the Act "emerged finally" in 1958, I do not mean that it was slow. Indeed, the most astonishing feature of this whole chain of events was the rapidity with which the government took action. We are, I am afraid, more accustomed to seeing excellent reports consigned to pigeon-holes. That was what happened with the Report of the Crown Proceedings Committee in 1927 (we had to wait until 1947 for our Crown Proceedings Act, which at last made the Crown legally liable in tort) and with the Report of the Committee on Ministers' Powers in 1932. Imagine then the astonishment when the government

promptly accepted nearly all the Franks Committee's recommendations and the Tribunals and Inquiries Act reached the statute book a mere twelve months after the Report appeared.

The first thing the Act did was to set up a new body, called the Council on Tribunals, which is to be a permanent body and is to keep the working of tribunals and inquiries under review. In order to explain its task, perhaps I might shortly recall the main themes of the Report. During the last fifty years a great deal of new jurisdiction has been created by Acts of Parliament, but most of it has not been entrusted to the traditional courts of law. Particularly in the case of social services, such as national insurance and the national health service, the numerous disputes which are likely to arise in the course of administering the service are entrusted to special statutory tribunals, each created by the Act setting up the service. Thus a dispute over the rate of sickness benefit under the insurance scheme, or the sum to be paid to an injured workman, will be decided by a local tribunal consisting usually of three members, local people who give their services for little or no remuneration, and who meet and dispose of these disputes much more quickly and informally than courts of law. Similarly the question whether a doctor ought to be removed from the health service, or whether a conscientious objector ought to be exempted from military service, or even whether the headmaster of a private school is running it properly—there are special tribunals for all these matters, often with appeal tribunals also to deal with appeals. Acts of Parliament, particularly when they set up new social services, tend to provide their own built-in judicial system, which is quite different from the regular machinery of justice.

If this had not been done, the regular machinery of justice would have been grossly overloaded, and the administration of the new services and schemes of control would have been much less smooth and successful. Now, Parliament has made such free use of this technique that we have acquired new tribunals literally by the thousand. There are now, for instance, over two thousand under the supervision of the Council on Tribunals. The number is so large because of the network of local tribunals which covers the whole country. We suddenly woke up to the fact that here was a large and important part of the machinery of justice which was under no proper supervision. Statute after statute had extemporized new tribunals, but Parliament had never stood back to

look at its handiwork as a whole, and to ask how far it was a coherent system of judicature. As the tribunals bred and multiplied, there was a natural tendency to diversity, and there were many anomalies. Some sat in public, some in private, some allowed legal representation, some did not, some had legally qualified members, some did not, some gave reasons for their decisions, some did not, some were subject to appeal, some were not—I could go on, but it is all in the Committee's Report. Each tribunal was looked after by the government department in charge of the service or scheme, but the departments, once they had set up their tribunals and made regulations for their procedure, tended to leave them to their own devices. There was an excellent reason for this—that government departments ought not to interfere with judicial proceedings; but the result was that the tribunals were nobody's children, and thus provided a breeding-ground for anomalies. On the whole they worked well, thanks to the good service rendered by thousands of willing chairmen and members; but the system was disorderly, and the time had obviously come for them all to be drawn up on parade and inspected. This is what the Franks Committee did, and they bequeathed to the Council on Tribunals a valuable legacy of general principles which the Council is endeavoring to apply.

Let me now give one or two examples of the sort of work the Council on Tribunals is doing. I have had the privilege of helping in this work, for I took a modest part in advocating some such body at the Committee's hearings, and, on the principle that the punishment ought to fit the crime, I was made a member of it when it was set up at the end of 1958. We have therefore been in existence for nearly two years, and our first Annual Report was presented to Parliament last April. One important matter that came up at an early stage was the giving of reasons. This of course is one of the fundamental things that ought to apply to all decisions, whether judicial or administrative, which affect people's rights. But our law has been curiously hazy about it, largely I think because reasons are in fact usually given and it has been very rare for judicial review to be invoked on this ground. I know of no case before the Act where the decision of a tribunal has been challenged for want of reasons, but there have been cases where appellate courts have refused to upset the decisions of ordinary law courts merely because the reasons were unstated. So it looks as if the common law would not require reasons from tribunals. Yet obviously this

is contrary to the principles of natural justice, and all the more so where there is a right of appeal—and our Committee of 1932 duly pointed this out. The Franks Committee came out strongly in favor of reasons, and as the result of pressure in Parliament a provision about reasons was inserted in the Tribunals and Inquiries Act, 1958. This applies to all the tribunals covered by the Act and also to inquiries, and it provides that reasons must be given if they are requested "on or before the giving or notification of the decision." It also provides, perhaps unnecessarily, that the reasons shall be taken to be incorporated in the record, so that the decision is what is called a "speaking order," that is to say an order carrying its reasons on its face; then if any mistake of law appears from the reasons certiorari will lie for error of law on the face of the record. The new duty to give reasons is therefore backed up by effective judicial control. But the Act also provides —and this is where the Council on Tribunals comes in—that the government, after consultation with the Council, may exempt any tribunal or class of tribunals from giving reasons if they consider that to give reasons would be "unnecessary or impracticable." We rather feared that a whole host of exemptions would be claimed, but that did not happen. Instead, only three claims were submitted, and on the Council's advice the government rejected all but one of them. The one exception was certain tax tribunals, and they were given exemption only because there is already a statutory procedure for obtaining reasoned decisions by way of case stated. The net result, therefore, is that the right to reasons is preserved intact. Of course, the reasons must sometimes be meagre, according to the nature of the case. Even judges and juries are not expected to give reasons for findings of fact, and the tribunal's reason will often have to be merely "We do not believe your evidence," or "We do not think your conscientious objection is sincere," or "I find that the proper rent for this farm is £3 an acre."

Another task which has kept the Council busy is the supervision of procedural rules for tribunals. New tribunals are still cropping up like asparagus in May, and under the Act the Council has to be consulted about the procedural rules which government departments make for them. There is also a steady flow of revised rules for existing tribunals, as circumstances require their revision. Thus the Council has an opportunity to see that the rules give proper rights of hearing, representation, and so forth, and a good

many amendments have been secured already. It is due to the departments to say that they have been most co-operative in accepting these amendments. I ought to make it clear that the Council is a purely advisory body, with no executive power; but it is quite independent of the government, and can always publish its views, so that there is always the political sanction in the background.

Now I will turn for a minute to the other subject, inquiries. These also play a big part in our administrative system, just as agency hearings do in yours. The object of an inquiry is to give a full and public hearing to people who object to some proposed act of government policy which affects them particularly, such as taking their land, imposing planning restrictions on it, or planting a new town in the peaceful rusticity of their homes. We have always believed that we have more of these disputes than you do because our compensation is less generous—though we have taken steps to put an end to that reproach by an Act of last year which restores open market value (as opposed to a theoretical value based on the planning law) as the basis of compensation. All the same, state policy today calls for much acquisition of land, and much detailed control of the use of land by private owners. So there are many objections, and many inquiries. Those held by the Ministry of Housing and Local Government alone number something like 5,000 a year. An inquiry of this kind is held before an inspector appointed by the ministry concerned, and usually he is one of the ministry's own staff of inspectors. In Scotland there is an enlightened practice of employing independent lawyers to hold inquiries, and one or two English departments do likewise. But as a general rule, the inspector is an official of the department promoting the scheme.

You will see that here we meet difficulties very similar to those which led to your Administrative Procedure Act. The Franks Committee wanted the inspectors to be detached from their departments and formed into separate corps under the Lord Chancellor, so as to give them more independence—or, at least, an appearance of more independence, for this is a matter where appearance is as important as reality. This was the one major recommendation which the government felt unable to accept, since inquiries are so numerous and inspectors are so hard-worked that it was felt to be essential to preserve the present administrative machinery. Although the inspectors have not become "Lord Chancellor's men," as was suggested, they are nevertheless greatly

respected by the legal profession for their competence, courtesy and patience, and there is no real complaint about bias, or the appearance of bias, on their part.

On the other hand the government have allayed two other complaints about inquiries where there really were genuine grievances, and on which the Committee made strong recommendations. The first is that objectors should be given a helpful statement of the case they have to meet. Too often in the past the inquiry was merely an opportunity for objections to be stated—"to blow off steam," as the Labour Government's Attorney-General once put it —yet the objectors might have little clear idea of the policy behind the scheme which they wanted to oppose. Now there is a policy statement, and both the authority proposing the scheme and any other department concerned with it must lay their case fully before the inspector in public at the inquiry. The other matter, a subject of long standing controversy, is the publication of the inspector's report to the Minister. The general rule in the past (with some exceptions) has been to refuse publication of the Report, on the argument that it was merely one paper in the whole dossier on which the Minister's decision was taken. The House of Lords gave their blessing to this practice in the *Arlidge* case of 1914; but with great respect (as all good lawyers say when speaking of each other disrespectfully) it would seem that a wrong turning was taken. Although the Franks Committee were told that publication would be very embarrassing and that inspectors would have to worry about their grammar and spelling, the case for non-disclosure was more respectable than one might think from some of the arguments used to defend it. But now at last the change has been made, the reports are made available, and we are glad to find the Chief Inspector of the Ministry of Housing and Local Government saying in print that the new practice has markedly improved public relations. This represents a victory for public opinion, and especially for legal opinion, which has been pressing for this reform for many years.

These changes have already been put into effect by administrative action. But the government have taken power to make a statutory code of procedure for inquiries, subject to consultation with the Council on Tribunals. Before long, therefore, the Council will have the intersting task of examining the new rules.

I have described all this very generally, omitting a great deal of detail, and I realize that it may sound rather elementary. But it has to be remembered, particularly when comparing our tribunals

and inquiries with your independent regulatory commissions, that political control plays a larger part in our system, and legal control a smaller part. We believe in regulation all right, but not in independence: our ministers are directly responsible to Parliament, and their departments are sensitive to Parliamentary questions and other forms of Parliamentary attack. According to our ideas, all agencies of government should answer before Parliament for the power they exercise. Even the nationalized industries, which are intended to have a large measure of independence, are subject to ministerial direction and so subject to a certain measure of Parliamentary control. By making all important policy-making powers dependent on the support of the Parliamentary majority we try to avoid the problem of power without responsibility—or power in a vacuum. I have read Mr. Hector's memorandum on the Civil Aeronautics Board and also the Board's reply in which, like Achilles answering Hector's challenge, the Board is defended as an effective policy-making body. Far be it from me to wish to embroil myself in this heroic combat. But perhaps I might say that the problems of combining policy-making power with judicial procedure are likely to be more difficult in your independent agencies than in our ministries, which are all integrated into the powerful policy-making machine which our system of cabinet government represents. Our problem is how to temper this power with more judicial procedure. What is encouraging in our situation at present is that the tide has turned in favor of the ideal of administrative justice, and we have for the first time a permanent body whose job it is to work for higher standards. These may be small beginnings, but the important thing is to be moving in the right direction.

In the long run, all depends upon public opinion, and if lawyers dot not overstate their case, but insist always on the fundamentals of justice, they can influence opinion beneficially. One of our ministers was in trouble not long ago for saying that the average Briton only looked at his newspaper to see the result of a football match or a horse race. And Chesterton, in a despondent moment, said that the trouble with the British public was that they were not interested in the equality of man, but only in the inequality of horses. I do not believe this. I think that such progress as we can make, even in the technical and abstruse world of administrative law, must be firmly based on the ordinary man's sense of justice—perhaps the deepest instinct which our two peoples cherish in common.

THE INVESTIGATED CLIENT IN ANTI-TRUST MATTERS AND HIS ATTORNEY

By Albert E. Stephan

Grosscup, Ambler, Stephan & Miller, Seattle, Washington

I. The Investigated Client and His Attorney

A surprise call at the office of a client by a gentleman from the Anti-Trust Division, the F.B.I., or the Federal Trade Commission, requesting an interview and access to company files, is often the opening scene of an anti-trust investigation. Against such a contingency, the prudent attorney may previously have forewarned his various clients to request that any such initial interview may be deferred until counsel is present.

As Judge Barnes, now of our Ninth Circuit, said when he was Assistant Attorney General in charge of Anti-Trust:

> "A corporation as well as a natural person has an absolute right to refuse to give the F.B.I. information or access to its records." [1]

But the problem is much deeper, involving the alternatives of formal proceedings, grand jury investigations, and other matters to be discussed.[2]

(a) *What Starts the Call?*

Investigations arise from many sources, notably complaints by the public to the Department of Justice or to the Federal Trade Commission. These come, for example, from nationally known companies complaining of the practices of competitors or suppliers, or from a leading anti-trust defense lawyer complaining of uniform trade-in allowances by major office machine companies, or from businessmen who protest they understand price-fixing is "okay" as long as it is not in writing, and then complain about a fellow-member who breaches an oral agreement.[3]

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[1] PRACTICING LAW INSTITUTE, UNDERSTANDING THE ANTI-TRUST LAWS (1955 ed.) p. 129; *cf.* Harris v. U.S., 331 U.S. 145, 155-181 (1947), Frankfurter, J. dissenting; Silverthorne Lumber Co. v. U.S., 251 U.S. 385 (1920).

[2] The Federal Trade Commission, unlike the Anti-Trust Division, does have compulsory powers. See 15 U.S.C.A., §§ 46(b), 49.

[3] *Complaints of anti-trust law violations and their investigation—the work of the complaint section of the Anti-Trust Division.* 7 LAW AND CONTEMP. PROBLEMS 90-92.

Forty of 57 new anti-trust filings concerned small firms. Some recent examples:

> "Pretzels and potato chips; brassieres; stitchers and staplers, rags, jukeboxes, gunsights, olive oil, fish-sticks, Kosher meats, shoulder pads, hormones, fencing, whipping cream, cranberries, burial insurance, frozen pizza, bottle caps, aptitude tests, and bull semen." [4]

Thus, the impact of anti-trust is by no means limited to the familiar giants of steel, transportation, lumber, or electrical equipment. It embraces every industry.

In the past decade, anti-trust litigation—civil, criminal, administrative, treble damage and injunctive—have multiplied many-fold over all such prior litigation since the Sherman Act was enacted in 1890.

(b) *What Is the Applicable Law?*

It is extraordinarily difficult to forecast or predict the legality of business activities within the anti-trust area. For example, in 1958, the able chairman of the ABA Anti-Trust Section emphasized:

> "The swing of the judicial pendulum * * * has carried our anti-trust laws first to a business right, and then to a government left * * * . Today it seems clear the anti-trust pendulum is finally swinging in the direction of a more neutral position * * * . *Most important* * * * has been *the increasing willingness* both of the courts and of the Federal Trade Commission *to recognize* substantial merit in * * * *old landmarks* and reasonings in this field of law sympathetic to business. *Thus the Colgate* * * * *decision (is) again being cited by the courts.* * * *" [5]

But less than two years later in 1960, a decision by the Supreme Court led Justices Frankfurter and Whittaker, dissenting, to say:

> "Scrutiny of *the opinion* will reveal that the court *has done no less than send to its demise the Colgate doctrine* which has been a basic part of anti-trust law concepts since it was first announced in 1919 * * * ." [6]

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[4] *Anti-Trust Targets,* Wall Street Journal, June 9, 1959, p. 1, 16.

[5] PRACTICING LAW INSTITUTE, UNDERSTANDING THE ANTI-TRUST LAWS (Feb. 1958 ed.) pp. 62, 65. [Emphasis supplied unless otherwise noted.]

[6] U.S. v. Parke, Davis & Co., 362 U.S. 29 (1960).

This confusion in court decisions requires the attorney, however competent and experienced in other fields, to carve out a substantial amount of time for study, analysis of the facts, and reflection in order to determine the potential anti-trust liability of his client.

The applicable statutes are relatively short and generally broad in language. They are:

1. The Sherman Act. 15 U.S.C.A. Secs. 1-8.
2. The Clayton Act. 15 U.S.C.A. Secs. 12-27.
3. The Robinson-Patman Amendment to the Clayton Act. 15 U.S.C.A. Sec. 13.
4. The Federal Trade Commission Act. 15 U.S.C.A. Secs. 41-58; and
5. Certain additional acts such as the Webb-Pomerene Export Trade Act, 15 U.S.C.A. Sec. 61; the Wool Product Labeling Act, 15 U.S.C.A. Sec. 68; the Fur Products Labeling Act, 15 U.S.C.A. Sec. 69; the Textile Fibre Products Identification Act, 15 U.S.C.A. Sec. 70; and related acts.

There are also specialized administrative fields of surface, water and air transportation, communications, banking, etc., into which the phases of anti-trust are consigned by various statutes to the I.C.C., F.M.B., C.A.B., F.C.C., F.R.B., etc.[7]

Of greater importance is the host of court decisions. They are collated in many treatises, articles and services.[8]

There is an abundance of literature on investigative practices to be examined at more leisure than permitted in this survey.[9]

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[7] *Cf.* 49 U.S.C.A. § 5; 46 U.S.C.A. § 814; 15 U.S.C.A. § 21; *passim.*

[8] *Cf.* CCH TRADE REGULATION REPORTS and sources there tabulated.

[9] *Symposium on the trial of an Anti-Trust Case by the Department of Justice, and on the Hearing of an Anti-Monopoly Complaint by the Federal Trade Commission, 4 ABA ANTI-TRUST SECTION REPORT,* (Apr. 1954, 196 ff.).

Defense of an Anti-Trust Proceeding, 5 ABA ANTI-TRUST SECTION REPORT, (Aug. 1954, 81 ff.).

Nitschke, Procedure in Anti-Trust Investigations, 1950 UNIVERSITY OF ILLINOIS LAW FORUM, pp. 595-628.

Morison, Investigation by Grand Jury Subpoena, and other discovery processes, ANTI-TRUST LAW SYMPOSIUM, Section on Anti-Trust Law, New York State Bar Association, 1953. (CCH 1953).

The Sherman Anti-Trust Act and its Enforcement, LAW AND CONTEMPORARY PROBLEMS, *Duke University, Winter 1940,* including articles on Work of the Complaint Section of the Anti-Trust Division, Selection of Cases for Major Investigations, Process in the Investigation of Complaints, and Conduct of Grand Jury Proceedings in Anti-Trust Cases and Trial Technique in Anti-Trust Cases. (156 ff.).

(c) *The Published Rules*

The Rules of Practice of the Federal Trade Commission are set out in 16 C.F.R. Sec. 1.1 ff., and are reprinted in 15 U.S.C.A. (1959 Supp. p. 44 ff.). Sub Parts B and D relate to the investigative proceedings by the Commission.

There are no formal rules—only judicial and practical limitations—for F.B.I. or Department of Justice investigations.

(d) *What Are the Types of Anti-Trust Investigation?*

There are five normal situations by which your client learns of the start of an anti-trust investigation:

1. An informal call by a representative of the Anti-trust Division, or F.B.I. on behalf of the Department of Justice, without compulsory power.
2. An informal call by a representative of the Federal Trade Commission, but with compulsory power, 15 U.S.C.A. Sec. 46(b), 49.
3. Grand Jury *subpoena duces tecum,* and frequently *ad testifacandum,* issued by a United States District Court on behalf of a grand jury at request of attorneys of the Anti-Trust Division.
4. An informal call by a representative of a Congressional Committee, presently the so-called Celler Sub-Committee of the House Committee on Judiciary Investigating monopoly practices, frequently followed by a subpoena; and
5. A civil suit brought by private persons alleging violations of the several anti-trust acts and frequently seeking treble damages and injunctive relief.

Broadly speaking, in one way or another, the public and private investigating procedures grant the widest latitude in ascertaining the pertinent facts. They also impose very heavy burdens upon business, both large and small, in producing relevant documents. But the public interest in implementing the law has generally permitted those quests for facts and examination of documents to proceed.

This paper will undertake to analyze the normal stages of these investigations with suggestions for the attorney and his investigated client as to the best methods to follow.

Federal Trade Commission Power to Conduct Field Investigation and Panel Discussion, 14 *ABA ANTI-TRUST SECTION REPORT,* (Apr. 1959). (90 ff.).

See also PRACTICING LAW INSTITUTE, UNDERSTANDING THE ANTI-TRUST LAWS (1952 et seq. editions).

(e) *Which Agency Investigates—The Department of Justice or The Federal Trade Commission?*

Because of different investigation methods and penalties, and since much anti-trust jurisdiction is concurrent, it is important to know which agency investigates. In a recent session of the A.B.A. Anti-Trust Section in Washington, D.C., felicitously entitled "Behind the Silken Curtain," representatives of the Department of Justice and Federal Trade Commission frankly revealed this.[10] The Wall Street Journal was even more explicit:

> "How is it decided whether the Justice Department or the Federal Trade Commission will investigate a particular merger? It depends pretty much on the luck of the draw. Or, as one trust-buster puts it, 'we operate pretty much on a first-come, first-serve basis.' " [11]

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[10] The Acting Assistant Attorney General, Mr. Robert Bicks, said:

"I think it might be helpful to explain very briefly just how the liaison procedure works. Its almost daily and routine application, of course, involves the concurrency of new mergers, new investigations of such mergers.

"The first thing each morning, after the morning journals and papers have been scanned, generally a conference more or less informal is held by designated liaison officers of each agency. At that time some decision is made as to which, if either of the two agencies will look into a particular merger. That decision is made generally on the basis of prior experience with either the industry or the companies involved. . . ." *ABA Anti-Trust Rep.*, Apr. 1954, at 79-80.

[11] "The selection process follows a simple pattern. Each morning Alice Fossett sits at her Justice Department desk and reads the newspapers. A few blocks away, her FTC counterpart, George Roundtree, does the same thing. Mrs. Fossett and Mr. Roundtree serve as the liaison between the two agencies.

"Mrs. Fossett may see the report of a merger that interests her. She will pick up the telephone and say something like this: 'George, I see by the paper Widgett Co. plans to merge with Fidgett Corp. We are interested in that industry. How about if we take a look at it?'

"If Mr. Roundtree believes that there is no conflict with F.T.C. activities, he will give his okay. If not, the matter is batted back and forth until one agency gets the go-ahead.

"Actually, the allocation of investigatory work is not quite as arbitrary as it might seem. Victor R. Hansen, who recently quit as head of the Justice Department's Anti-Trust Division, says it is 'based upon a case-by-case account of past experience, present manpower, and remedies available to each agency.' And past experience in many cases has pretty much carved out exclusive territories for each agency. For example, the Justice Department usually handles investigations of the major auto and steel manufacturers. Food and dairy cases, more often than not, wind up at F.T.C.

"Available remedies necessarily channel certain cases to the Justice Department; only the Department can prosecute on criminal charges."

Wall Street Journal, May 22, 1959, p. 1.

(f) *Preliminary Field Inquiries by Anti-Trust Division*

The Division does not investigate all complaints received, but screens them *first* as to possible violation of the Anti-Trust laws; *second,* whether interstate commerce is involved; *third,* whether the Division has previously investigated the same subject; *fourth,* whether it is of public concern; and *fifth,* whether Federal Trade is currently investigating the same subject.

When this screening is done, the Division personnel in Washington, D.C. or in cities where an Anti-Trust Division field office is located, makes a preliminary inquiry. On the West Coast, for example, there formerly was a field office in Seattle which did much of the preliminary investigation. It is now closed, and the nearest one is San Francisco.

Such an inquiry usually consists of interviews with informed persons, including other government agencies, and collection of sufficient economic data about the industry and the complaint to decide whether further action is justified.

> "Businessmen are often unaware of the extensive sources of information available to the Department of Justice. Financial manuals, papers and trade journals contain considerable information as to particular contracts and arrangements between companies, as well as general trade practices. From files of other Government agencies may be obtained materials supplied by the companies themselves, such as reports to the Securities and Exchange Commission, the Federal Trade Commission, and the Bureau of Internal Revenue." [12]

(g) *F.B.I. Investigations*

If the preliminary inquiry justifies a more extensive survey this is usually done by the F.B.I. It frequently includes interviews and file searches not only of potential defendants, but also of competitors, customers and suppliers who may have knowledge of industry practices or possibly of the violation.

(h) *F.T.C. Procedure in Making Informal Investigations*

Commission investigations usually start with a complaint from someone alleging a violation of law by some specified person or

[12] Nitschke, *Procedures in Anti-Trust Investigations,* UNIVERSITY OF ILLINOIS LAW FORUM (1950), pp. 594-5.

group. It is the Commission's policy not to divulge the name of the complaining party. F.T.C. Rule 1.21.

The Commission does not ordinarily take action where the alleged violation of law is merely a matter of private controversy which does not tend adversely to affect the public.

The Commission is empowered to issue investigational subpoenas. 1.35. It may order testimony taken by deposition. 1.36. It may, on preliminary investigation, require access to corporate records, 15 U.S.C. Sec. 46(b), 49.

There may follow one or more of the following steps:

> Further interviews or correspondence with the complainant as to the practices considered to be unlawful;
>
> Locations of other persons who might be involved in similar restraints;
>
> Interviews with other persons similarly situated to check the leads obtained; and
>
> Preparations of an economic study on the structure and competitive situation of the industry and the companies involved.

II. The Investigator's Call

Thus it happens that the sometimes unsuspecting client receives his first call from a representative of Justice or of the Federal Trade Commission. The call may be investigating some alleged wrongdoing by your client, or he may be checking sources as to alleged anti-trust violations by others.

There is frequent difference in the training and approach of the caller. If from the Anti-Trust Division, he is well versed in this field. If an F.B.I. agent, he is generally a competent lawyer or accountant, trained to investigate a wide range of federal violations from mail or tax fraud to kidnapping and other offenses. He may or may not have had experience with anti-trust. If not, he may rather be an emissary for the Anti-Trust Division who calls with a written letter in his hand containing instructions as to what is sought from the interview or documents. In my own experience, he has been unfailingly courteous and conscientious but, sometimes, a little uncertain as to his authority to furnish you, for example, with the details of what he seeks. Thus, when we requested permission to have a copy made of the material listed in his letter, he felt this was contrary to Department policy except as we could make hand-written notes or abstracts of the items.

On the other hand, when the Federal Trade Commission attorney-examiner or investigator calls, he is generally familiar with the specialized field of anti-trust laws as administered by that agency.

(a) *Right of Counsel to Be Present—F.B.I.*

Sometimes there has been reluctance by the Government to permit private counsel to attend the informal interview. The right of counsel to be present was clarified recently in a panel discussion in Washington.[13]

> MR. CHAFFETZ (of the Chicago Bar): "I have a question, the answer to which is quite obvious, so obvious that I think I had better state the reason for asking it.
>
> "The question concerns the policy of the Department of Justice, or the F.B.I. in permitting counsel to be present when a witness is interviewed by an F.B.I. agent. The reason I ask the question is that some time ago I had occasion to challenge an F.B.I. agent who sought to persuade a witness that he must not make known to his counsel that he was being interviewed. The answer I received was 'You don't blame us for trying, do you?'
>
> "What is the answer to that, Mr. Bicks?"
>
> MR. BICKS (the acting Assistant Attorney General of the Anti-Trust Division): "The answer is that, quite obviously the F.B.I. has no power to compel anyone to be interviewed or really compel access to any document or file, I would say. Since, from that absence of compulsion, I think there is an absence of power. Because, quite naturally, the right of anyone to be represented by counsel during such an interview is a matter of policy. * * * As a matter of policy, I do not know—I have never heard of any suggestion that such presence would not be appropriate."
>
> MR. CHAFFETZ: "I suppose the real question would be: Would the Department of Justice regard the refusal of a lawyer to allow his client to be interviewed in his absence as a refusal to cooperate with the Department of Justice?"
>
> MR. BICKS: "No, I do not think it could."

(b) *Limitations on File Search—Presence of Counsel—F.T.C.*

Similarly the Attorney in Charge, New York Office, Federal Trade Commission, was asked during the same panel discussion: [14]

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[13] 14 ABA ANTI-TRUST SECTION REPORT, Panel Discussion April 1959, pp. 77-8.

[14] 14 ABA ANTI-TRUST SECTION REPORT, pp. 50-51.

"Q. (By Mr. Williams of the Washington, D.C. Bar):

"All of us, I think, are concerned with the danger of unrestricted file search. We are bothered. We think there is a fair chance that something discreditable may turn up and, under those conditions, I would like to ask Mr. Seidman whether, normally, when a file search is undertaken in practice, he seeks a roving commission, an unrestricted file search or whether, at the start, he limits his request within reasonable bounds."

"MR. SEIDMAN: I think you will find that the Commission attorneys are at all times reasonable.

"In actual practice our attorneys never walk into a corporation and just say, 'give us access to your files as required by the Federal Trade Commission.' We state the nature of the investigation, the charges that are being investigated, and the scope of the investigation as we know it at the time. And we limit our request for access to the files to those which are relevant to the inquiry or would appear to be relevant to the inquiry.

"Now with corporations today, for the most part, as soon as an attorney does call, either house counsel or outside counsel is called in. And very often they request a statement in writing, which we are very happy to furnish, indicating specifically what are the files to which we request access.

"Again, I suggest this question in itself demonstrates the better approach to a Commission investigation because, should our request seem unduly burdensome to the corporation or to counsel at this informal stage, the request can be discussed and possibly initially limited within more reasonable bounds from the respondent's standpoint, with, of course, the reservation that, should those files produce evidence which indicates the need to go further, we do reserve the right to make further inquiry."

(c) *Whether to Cooperate*

Some years ago I recall a similar panel on tax-fraud cases in which the speaker urged a knowledge of tax law and then the desirability of cooperating with the Bureau of Internal Revenue or the Department of Justice "at least short of inviting your client right straight into Leavenworth." In the anti-trust field sound advice to the client at the investigatory stage also requires a broad grasp of the substantive law and a knowledge of the procedural steps.

Whitney Seymour gives this caveat:

"Small companies, and sometimes others who assume (occa-

sionally to their subsequent sorrow) that a disarming hospitality is likely to soften investigators' ears, usually can arrange for an examination of their files by agents of the Federal Bureau of Investigation. * * * Experience causes reluctance to follow such a procedure. It sometimes results in inquiries beyond the limits of any subpoena, and the company may have extreme difficulty in keeping fully privy to the documents examined, copied and noted." [15]

(d) *The Client's Conduct on Investigation*

One writter has suggested that, as a broad proposition, it is desirable to cooperate with a Government investigator.[16] This has some psychological merit. But in each instance it depends on the circumstances of the particular case.

(e) *Don't Close the Door*

In any event, when the investigator makes the first call, do not close the door. His call is an opportunity to learn, at the least, the framework of the government's inquiry. You may need to advise him courteously of a desire to cooperate, yet request that the information or documents sought be itemized in written form. Generally, this is then processed to headquarters in Washington, D.C., which will comply. The time interval may afford opportunity to study the relevant facts and files and to review the applicable law and cases, but not to destroy parts of the files! (Besides, in this era of 3 salmon, 2 blue and 1 yellow copy, the effort would be futile.)

And certainly there are cases where cooperation and full disclosure avoids a grand jury investigation which, regardless of outcome, carries some sense of stigma in the minds of most laymen.

(f) *When Not to Demand a Written Request*

Many of these problems must be played by ear. Frequently a call is made, not to accuse your client but to inquire about complaints made as to others. If you require the agency to reduce its inquiry to a written demand, that effort alone may enlarge a casual inquiry into a full-blown investigation, including the detailed

[15] N.Y. ANTI-TRUST SYMPOSIUM, CCH 1953, p. 34.

[16] See Timberg, the *Anti-Trust Laws from the Point of View of a Government Attorney,* Practicing Law Institute (1949) 32-35.

affairs of your client. Hence, to repeat, "don't close the door" to informal discussion. It may reveal that only a limited file search and brief interview will satisfy full cooperation. If so, do it promptly.

But, if the investigator reads off a long and detailed list of subjects of inquiry, the matter has usually passed far beyond the preliminary stage and better practice seems usually to request the demand be in writing.

(g) *Preservation of Records*

It is fundamental that, when any investigation is initiated, it is incumbent upon the client and the attorney advising him to preserve all existing records. But, on the other hand, there is no necessity, prior to an investigation, to keep files forever.[17]

Obviously no record should be destroyed after an investigation is initiated.[18] The Anti-Trust Division also contends that the statute forbidding the obstruction of justice applies if the person has reason to believe that an F.B.I. investigation is in progress and, with intent to impede that investigation, destroys papers which may be called for by the Grand Jury.[19]

III. Conduct of the Informal Investigation

Assuming now that the matters have been set forth in writing, and that counsel is present, and that an oral interview is taking

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[17] "Today it is standard practice on the part of alert companies to have their files examined periodically by qualified persons. * * * Some companies have a routine practice of destroying, at 6-month intervals, all files which are more than 2 years old, with the exception of those which may be valuable for permanent records, or which are required to be kept by law."

Wadmond, Defense of an Anti-Trust Proceeding, 5 ABA Sec. of Anti-Trust Law, at 35-6.

Cf. Shapiro v. U.S., 335 U.S. 1, 6 (1947) for a compendium of Federal Statutes which require the retention of records. In some specialized fields Congress has required records to be preserved a designated number of years. Cf. *Wool Products Labeling Act of 1939,* Sec. 6(b):

> "Every manufacturer of wool products shall maintain proper records showing the fibre content as required by this Act of all wool products made by him, and shall preserve such records for at least 3 years * * *" 15 USCA Sec. 68j, (b).

"It would seem unlawful for a person who voluntarily gives access to records to thereupon conceal or destroy any records coming within the scope of the consent, although there are no decisions squarely on the point. The Department has proceeded under both the 'false statement' statute and under the 'obstructing justice' statute in both situations." See Nitschke, *supra,* p. 603, notes 62 and 63.

[18] 18 USC Sec. 1503 and also Sec. 1001; and see Vosselman v. U.S., 239 Fed. 82 (2d Cir. 1917).

[19] See the remarks of Asst. Atty. Gen. Barnes in UNDERSTANDING THE ANTI-TRUST LAWS (1955 ed.) p. 132.

place, it is highly desirable to have a junior assist by taking informal notes of what transpires during the meeting or, alternatively, that the principal counsel make an abstract of the subject matter of the informal conference. Very frequently the investigator will not make notes but, equally frequently, he has a prodigious memory and, after he has departed, he will go to the nearest spot for a cup of coffee and record at once his recollection of what transpired.

Occasionally, and most recently in the Oklahoma oil cases, an F.B.I. agent testified at the trial as to his understanding of certain damaging statements made during an informal investigation. Opposing counsel was greatly aided by notes made during that interview which enabled him to cross-examine concerning many favorable statements also made by the accused client during the course of that interview. You will recall this was the case which was dismissed by the Court at the conclusion of the Government's case.

(a) *Should There Be Voluntary Submission?*

The question of whether or not an attorney should advise his client to consent to voluntary procedures is a matter of judgment, and a judgment which may vary depending upon the circumstances. Generally speaking:

> "Businessmen are not likely to cooperate with enthusiasm in an enterprise designed to prove that they are criminals, and their decision to cooperate or not is usually based on whatever will get then into the least trouble." [20]

There are significant differences between voluntary submission and response to subpoena. Voluntary submission waives the privilege against self-incrimination. The anti-trust immunity statute only applies where documentary evidence has been produced under oath and in obedience to a subpoena.[21]

Even more important, voluntary access to files waives the attorney-client privilege under the rule that disclosure of privileged communications without claiming the privilege is a waiver.[22]

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[20] Nitschke, *supra,* citing Walton Hamilton, Anti-Trust in Action, TNEC Monograph 16, 1941, at p. 49.

[21] 15 USCA Sec. 32 (1946). *See* U.S. v. Monia, 317 U.S. 424, and Nitschke, *supra,* at p. 600.

[22] *Cf.* Unreported Opinion of Judge Woolsey in U.S. v. American Optical Co., Civil No. 10-391 S.D.N.Y. Dec. 15, 1941.

"1. It is clear, therefore, that the price for the preservation of the client-

(b) *The Voluntary Tender of Documents*

Assuming, however, that a satisfactory written designation has been made of the subject matter and documents desired, the next task is the voluntary file search. The first question is "how far back?" Many anti-trust requests for information often have gone back scores of years.[23] This has imposed a terrific burden upon company officials making the search, to say nothing of the attorney who undertakes to scan all of the papers to be tendered. More recently the courts have restricted it to a reasonable period. Meanwhile the statute of limitation on treble damage private suits has been limited to a four-year period.[24] This same period is now frequently the voluntary limit of the Division's search in government civil inquiries on grand jury subpoenas.

(c) *Retaining Copies of Documentary Evidence*

It is exceedingly important in tendering any documentary evidence to retain a copy or the original of all material tendered. It is equally important and often highly desirable to number all of the pages serially so that ready reference may be made to any particular document. Likewise the material should be indexed or digested so that pertinent correspondence relating to a subject matter, whether favorable or unfavorable, may be immediately located. Where the material requested is voluminous, it has been my experience that the best method of tendering is to bind together various successive portions so that papers do not slip out

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attorney privilege from erosion is perpetual and perceptive vigilance. Where, as in the present instance * * * a letter of the attorney, otherwise possibly privileged, is handed to a third party, or a third party—in this instance the Government—is given access unreservedly, the privilege is waived.

2. Where papers are voluntarily submitted to the Government, there are difficulties in compelling the Government to return the papers or even to permit inspection. This is modified by Rule 16 of Fed. Crim. Pro. But even it requires a court order.

3. There is no obligation of secrecy on the Government with respect to matters voluntarily submitted. Frequently such papers are required by Congressional committees."

[23] In anti-trust litigation, the Government frequently asserts as relevant and material, facts concerning the operations of the defendants over long periods of years—20, 30 and even 50 years being mentioned to your committee as instances.

Procedure in Anti-Trust and Other Protracted Cases, a report adopted by the Judicial Conference of the United States, Sept. 26, 1951, pp. 20-21. *Cf.* ATTORNEY GENERAL'S NATIONAL COMMITTEE ANTI-TRUST REPORT, p. 364 (1955).

[24] 15 U.S.C.A. (1959 Supp.) Secs. 15b, 16(b).

and become separated, and to retain in a loose-leaf three-ring notebook the originals arranged serially in the same classification as those tendered and then indexed or digested.

Frequently, if full-faith cooperation is tendered, it is appropriate to request that, when the field examination is completed, and a report made to Washington, the counsel for the investigated party, or the F.T.C. respondent, be advised of its serial number identification of pages tendered which may have been renumbered as exhibits appended to the Government's field investigation report.

IV. Grand Jury Investigations

The Anti-Trust Division does not have power to make an investigation on the civil side,[25] although bills are pending in Congress to permit the Attorney General to require production of documents prior to filing an action.

Therefore the Grand Jury Investigation provides the only tool before filing a complaint which the Division has to secure access to information not voluntarily granted.

Sometimes persons are perfectly willing to disclose information in response to a subpoena by the Grand Jury or otherwise, but hesitate to do so voluntarily because of possible fears of reprisal or loss of industry friends.[26]

(a) *The Form of the Grand Jury Subpoena*

Grand Jury Subpoena, while issued at the instance of the Grand Jury, and while signed by the Clerk of the Court, is actually prepared by the United States Attorney long before the Grand Jury meets, tabulating the long list of documents which he seeks to have produced.

Grand Jury investigations usually commence with a subpoena being prepared by the attorneys for the Division. It calls for the production of described books and records. Only the counsel for the Government, one witness, and a duly authorized court reporter may be present in testifying before the grand jury.

Counsel for the witness, or for his employer, may not be present.

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[25] Compare the compulsory power of the Federal Trade Commission, 15 U.S.C.A. Secs. 46(b), 49.

[26] See the remarks of Asst. Atty. Gen. Hansen in PRACTICING LAW INSTITUTE, UNDERSTANDING THE ANTI-TRUST LAWS (Feb. 1958 ed.) p. 139.

"However, after your client has testified, you are free to learn from him, or for that matter from any other witness, what transpired while he was before the Grand Jury." [27]

A witness called before a Grand Jury has no right to be informed of charges, or the nature of the investigation, nor can he take exception to the particular subject matter under investigation.[28]

The Grand Jury has been used by the Anti-Trust Division as its principal method of investigation and indictment. But it is not used solely for this purpose:

"The Division has not hesitated, where the facts so indicated, to recommend the return of 'no true bill.' " [29]

Similarly:

"An attorney in the Anti-Trust Division may not, at will, commence or conduct grand jury proceedings, or even be present at a grand jury hearing. It has been the Division's practice, when grand jury action is deemed necessary, for a memorandum to be directed to the Attorney General by the Assistant Attorney General in charge of Anti-Trust, setting forth the facts and recommendations. This recommendation is made only after careful consideration of the facts and consultation with the Field Office Chief, Section Chief and other assistants involved.[30]

(b) *Broad Scope of Grand Jury Subpoena*

The Grand Jury subpoena has an ancient history, going back to earliest English and Colonial history.[31] It is used in anti-trust matters chiefly because of absence of other mandatory investigatory procedures for civil litigation.

Protest against subpoenas yields little insofar as reasonableness, statute of limitations, inconvenience, or burden is concerned.[32] But there are certain general limitations:

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[27] Asst. Atty. Gen. Barnes in UNDERSTANDING THE ANTI-TRUST LAWS (1955 ed.) p. 130. See also Fed. R. Crim. P. 6(e); and 5 U.S.C. Sec. 310.

[28] Hale v. Henkel, 201 U.S. 43 (1906).

[29] Arnold, Anti-Trust Law Enforcement, Past and Future, 7 LAW AND CONTEMPORARY PROBLEMS 1, 22 (1940).

[30] Nitschke, *supra*, 606-7, citing Hamilton, The Selection of Cases for Major Investigation, 7 LAW AND CONTEMP. PROBLEMS, 95, 98 (1940); Bergson, Current Anti-Trust Enforcement Programs and Policies, 38 ILL. BAR JOURNAL 170 (1949).

[31] *Cf.* Seymour, Anti-Trust Symposium 1953, p. 34.

[32] "The zealous attorneys who represent the Government are not unnaturally reluctant to take the chance that any document escape * * *. As they sit dictating

1. The subpoena must not be so broad and sweeping as to approach the character of old general warrants or writs of assistance. It must not be "a fishing expedition" or "a search through all of respondent's records, relevant or irrelevant, in the hope that something will turn up." Holmes, J., in *Federal Trade Commission* v. *American Tobacco Co.*, 264 U.S. 298, 306 (1924).

2. The documents must have some materiality to the investigation.

3. It must be a "reasonable period of time."

4. The documents must be described with sufficient particularity.

5. Burdensomeness does not make the subpoena unreasonable. See unreported opinion of Judge Barnes in *Petition of Borden Company* to quash two subpoenas duces tecum in the 1938 Chicago Milk Investigation (N.D. Ill. Sept. 12, 1938).[33]

6. It must not be used to secure privileged communications. *U.S.* v. *Medical Society*, 26 F. Supp. 55, 56; D.D.C. 1938. Cf. *U.S.* v. *Ideal Cement Co.*, Unreported, No. 9336, District Colo., Aug. 22, 1941 (Order of Judge Symes granting Petition of Rubinstein to quash Grand Jury Subpoena calling for correspondence between attorney and corporation and its officers). *Petition of Borden Co.*, 75 F. Supp. 857, 861 (N.D. Ill. 1948).

(c) *Tender of Documents by Other Means than Personal Appearance before Grand Jury*

Because the bulk of material in anti-trust investigation is so great, various alternative procedures have been used on occasion in lieu of strict compliance with the subpoena. Sometimes the Division offers to conduct a file search for what it wants in lieu of physical compliance by the Company, if the latter grants complete and unqualified access to its files.[34]

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grand jury subpoenas free from any substantial restraint except that which they apply to themselves, they slip easily into an expansive mood. The result is apt to be a group of subpoenas which seek information covering most of the affairs of the principal companies in an industry during the whole of their corporate lives. The burden, thus imposed on the corporations subject to investigation, is difficult to exaggerate. Compliance with such an anti-trust subpoena may literally involve the expenditure of many man-years and hundreds of thousands of dollars in the search for and examination of millions of documents. All the previous devices for slenderizing such big subpoenas have taken off only a part of their surplus fat." Seymour, *supra, passim*, 34, 35, 38.

[33] Quoted by Nitschke, *supra*, p. 616, note 152.

[34] Terrell, *Processes in the Investigation of Complaints*, 7 LAW AND CONTEMP. PROBLEMS at 102. In re investigation conducted by the Attorney General of the United States, 27 F. Supp. 997, 998 (S.D.N.Y. 1939).

Currently the Division frequently sends letters to the companies at the time of service offering them the opportunity of mailing in the record with an affidavit to the effect that the submission was in full compliance.[35]

Because of the length of time required to respond to a typical anti-trust subpoena duces tecum, calling for a great quantity of corporate files, it is the practice of the Division to issue the subpoenas well in advance of the return date. Subpoenas therefore are frequently issued and served long before the jury is impaneled. This is a practical necessity in most major investigations, and is probably unobjectionable, although it would seem necessary for the grand jury to be in session on the return date. *In re Harris,* 27 F. Supp. 480, SDNY (1939), p. 614.

A corporation is required to make only one search of its files, and the Government has not been permitted to issue several short subpoenas for portions of records as the jury examines them, but must file one subpoena calling for all the documents in the aggregate. *Petition of Borden Co.,* 75 F. Supp. 857 (N.D. Ill. 1948).

There is a divergence of opinion on who should respond to subpoena addressed to corporation.[36]

(d) *Self Incrimination*

15 USC Sec. 32, as amended, provides:

> "No person shall be prosecuted or be subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in any proceeding, suit, or prosecution under * * * [the anti-trust laws]: *Provided,* That no person so testifying shall be exempt from prosecution or punishment for perjury committed in so testifying."

A later amendment adds that—

> "* * * immunity shall extend only to a natural person, who, in obedience to a subpoena, gives testimony under oath or produces evidence, documentary or otherwise, under oath."

Hence, the immunity does not apply to testimony or records

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[35] Nitschke, *supra,* 619.

[36] *In re Bornn Hat Co.,* 184 Fed. 506, 508 (SDNY 1911). *In re American Sugar Refining Co.,* 178 Fed. 109 (SDNY 1910). It is not necessary for an individual to appear and testify even if subpoena contains a testifying clause. Essgee v. U.S., 262 U.S. 151, 157; but see Consolidated Rendering Co. v. Vermont, 207 U.S. 541, 544-5, holding that a corporation is entitled to have the person who brings them in sworn and identify the papers.

given voluntarily, nor to records produced in response to a subpoena, if they are merely turned over to the government attorneys rather than produced under oath before the Grand Jury. *U.S.* v. *Greater Kansas City Retail Coal Merchants,* 85 F. Supp. 503 (W.D.Mo. 1949).

Under these statutes, a sworn witness, appearing before an Anti-Trust Grand Jury under compulsion of subpoena, may not refuse to testify, but he does receive immunity with respect to anything incriminating he says; and his immunity is not waived by failure to claim, as in the case of Immunity Provisions covering many other statutes.[37]

(e) *Areas of Cooperation*

There are many areas of cooperation in connection with a grand jury investigation. For example, files may be far too broadly described to reach even the subject matter, and the burden can be reduced by discussing bona fide problems with the counsel for the Government. Similarly, reasonable extensions of time can normally be arranged if the papers cannot be produced within the time provided by the subpoena. There is no value in trying to discuss the matter with the head of the Anti-Trust Division in these initial stages. The staff can provide all of this cooperation. On the other hand, when the matter reaches a point where the head of the Division can have been informed by his staff as to the Government's viewpoint, then a conference with him, if desired, is timely.[38]

V. Conclusion

This survey can only outline the problems. The call may come suddenly. The need for analysis frequently requires study by the careful attorney. The range between complete acquiescence and headstrong resistance embraces many acceptable variants. It is the purpose of this paper to suggest a few salient criteria to aid the attorney whose client is about to be investigated concerning anti-trust matters.

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[37] *Cf.* U.S. v. Monia, 317 U.S. 424 (1943). *Cf.* SEC Act, 15 U.S.C. Sec. 78u(d) (1934).

[38] See the remarks of Asst. Atty. Gen. Hansen in UNDERSTANDING THE ANTI-TRUST LAWS (Feb. 1958 ed.) at p. 141.

A COMMISSIONER'S COMMENTS ON THE REPORT ON HEARING EXAMINERS

By Abe McGregor Goff

Commissioner, Interstate Commerce Commission

The Annual Report of the Committee on Hearing Examiners published in Volume 12—Spring-Summer, 1960, issue of the Administrative Law Bulletin of the Section, beginning at Page 235, criticizes the Interstate Commerce Commission for two of its actions in regard to Hearing Examiners. At the Section meeting in Washington I took exception to this report and was kindly granted permission for the publication of the substance of my remarks in the Bulletin in order to correct what I think is a misunderstanding.

The report refers critically to a memorandum issued by the Commission on February 1, 1960, calling attention to the impropriety of accepting undue hospitality from parties or their attorneys and also to the attendant press publicity as reflecting unfairly on the majority of examiners. The memorandum in question was cautionary, an internal agency directive on ethics, circulated to all attorney-advisors as well as hearing examiners, a total of more than 200 individuals. The memorandum was not released to the press, as publicity was not desired by the Commission and could only have reached the newspapers from one of the recipients. This could easily have been ascertained by contacting anyone in authority at the Commission. While not so intended, the issuance of the memorandum actually evoked widespread editorial commendation as an admonition against creating even an appearance of bias. Moreover, the memorandum stated specifically the Commission's confidence that the great majority did not engage in such conduct.

The second Committee criticism concerns a monthly work performance report required of all hearing examiners and attorney-advisors. The Committee report complains that the use of the report could result in "comparisons * * * which would inevitably impinge upon the independent judgment of hearing examiners." The Committee failed to take into account that there is a compelling necessity for a different administrative approach in an agency with a massive case load, which operates with 114 hearing

examiners as compared to one with 10 or 15 hearing examiners, just as there is a difference between a small two-man law office and a large metropolitan law firm. In telling that an appeal had been taken to the Civil Service Commission, it was stated that "unfortunately" the Civil Service Commission upheld the use of the monthly report but the reason given was not set forth. In its reply to the petitioning hearing examiners the Civil Service Commission made this significant statement:

> "The Civil Service Commission is fully cognizant of the reason for the prohibition against agencies rating the performance of Hearing Examiners and appreciates the importance of the preservation of their independent status. However, regardless of this independent status, a Hearing Examiner is nonetheless an employee and it is both the agency's right and duty to have an account of his work and of his hours of duty. Such an account is far different from a rating of performance as such, and is not inconsonant with the Administrative Procedure Act or the Commission's regulations."

There was not the remotest interference with the exercise of the hearing examiner's independent judgment. There was no derogation of his important role. The decision in any case is by the Commission. This makes it of the greatest importance that the Commission have the independent and unbiased judgment of its staff.

As indicated, there must be different techniques in administration of an agency which annually handles many more formal cases than the next six major regulatory agencies combined as compared to one with a smaller work load. However well intentioned the Committee report, it failed to recognize the responsibility of agency heads for effective administration of great regulatory programs.

MINUTES OF THE ANNUAL MEETING OF THE COUNCIL

WILLARD HOTEL—WASHINGTON, D. C.
AUGUST 27-28, 1960

The meeting of the Council of the Section of Administrative Law convened at 2:00 p.m., on August 27, 1960, in the South Ballroom, Willard Hotel, following a luncheon in the Congressional Room.

Attendance: All officers, and all members of the Council, except Counts Johnson, were present. In addition, approximately 50 other members of the Section, including many chairmen and vice-chairmen of committees, were present.

I. AGENDA

The tentative agenda for the Council Meeting was approved. Pursuant to motion by Mr. Beelar, duly seconded and adopted, the Agenda and Order of Business for the Section Meeting which had been distributed was also approved.

II. MINUTES

Minutes of the Midyear Meeting of the Council were approved.

III.

Brief remarks and announcements were made by Earl W. Kintner, Section Chairman.

IV. COMMITTEE REPORTS

1. *Committee on Agency Rule Making*

Victor G. Rosenblum, chairman of the committee, referred to report, found at pages 180-190 of Vol. 12, Spring-Summer Issue (1960), Administrative Law Bulletin, and commented specifically on several facets of such report, pointing out the difference between positions taken by some agencies in litigation and that taken by the same agencies in their replies to the Dawson Committee ques-

tionnaire. He also emphasized that, contrary to the fears of some, it is not our intent to "judicialize" the administrative process. John B. Gage moved that the report of the committee be approved; motion seconded by William I. Denning and Albert E. Stephan. John W. Cragun questioned the effect of the motion, since the report contains no recommendation—said any approval would be a "hollow" gesture. Donald C. Beelar inquired whether Mr. Cragun's problem would be met if language is changed by substituting "endorses view of" for "approval." Mr. Cragun said he agrees that it is a good report, but that the Section cannot express the view of the Association—only the House of Delegates has such power. Mr. Gage expressed the view that the position of the Association has been established, but that it is widely misrepresented. Mr. Cragun then moved, as a substitute motion, that a committee be appointed to draft and bring back to the Council, at 10:00 a.m., Sunday (August 28), a suitable resolution encompassing the views set forth in both the committee report and the report of the vice-chairman, Ruth Smalley. Mr. Rosenblum emphasized that he had no disagreement with the report of the vice-chairman but that it had not been possible because of the time element to include those views in the main committee report. The substitute motion was seconded by Raoul Berger and adopted. Mr. Kintner then appointed a committee composed of Mr. Rosenblum, as chairman, Mr. Gage and Miss Smalley to draft the resolution. The drafting committee reported back to the Council on Sunday with a resolution [1] which the Council, pursuant to proper motion and second, adopted.

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[1] The resolution reads as follows:

"The Council recommends to the Section the adoption of the following resolution:

'WHEREAS, The American Bar Association has, since 1956, advocated "that no agency rule, statement of policy or interpretation of statute intended to have general application or effect and required by a statute or rule to be published shall, in any particular case, be a basis for a sanction or a ground of decision unless previously so published; provided that this shall not preclude the formulation of ad hoc policies or interpretations arrived at as a result of particular proceedings if clearly within and relevant to the issues thereof." 81 ABAJ 373;

'WHEREAS, This resolution assumes that in a democratic society the citizen should have the opportunity to know the law by which he is bound, and this Section believes that much of the uncertainty and the hardships incident to retrospective application of agency law would be obviated if agency statements of policy or statutory interpretations were formulated through duly published rules or regulations and that only under unusual circumstances such as those

Robert M. Benjamin, chairman of the ad hoc committee charged with the responsibility of shepherding S. 1070 through Congress, said he would welcome the Section's views but also wants ad hoc committee participation.

2. *State Administrative Law Committee*

Frederic L. Kirgis, chairman, reported briefly on the work of the committee and referred to its report found at 12 Ad. Law Bull. 310-311. The committee has continued to gather data re legislation in the various states concerning administrative practice and procedure and now has information regarding a number of states. The committee is also gathering commentaries from its members and others as to the operation of statutory law and the behavior of administrative agencies under statutory law in the various states. Mr. Kirgis offered to make such data available to the National Conference of Commissioners on Uniform State Laws.

Dean Blythe Stason was present and made a few remarks about his work in the Section of Administrative Law, stating that his experience with the Section and Council had been among the top intellectual experiences of a lifetime; that it was a deep regret with him that he had been forced to "slough off" some activities and that his work with the Section was one of the activities he had been forced to abandon for at least a time; that the coin had turned again, since he was within six days of retirement as Dean

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cited in the ABA's 1956 resolution, should agencies possessing legislative powers and the authority to declare law through rule or regulation utilize the "case to case" or adjudicatory method in the formulation of such law;

'And Whereas, The Ad Hoc Committee for the Code of Administrative Procedure has authority to represent the Association in implementing the principles adopted by the Association for the Code of Administrative Procedure;

'*Therefore, Be It Resolved,* That the Section of Administrative Law recommends that administrative agencies

'(1) shall, as expeditiously as possible, formulate and publish those rules (a) required by statute and (b) authorized by statute and involving policy formulations or interpretations susceptible to statement as rules;

'(2) shall, as expeditiously as possible, codify or digest established agency policies stated in decisions relied upon by them as agency precedents; and

'(3) shall, as a basic policy, prefer and resort to the rule making rather than adjudicatory procedures for the formulation of norms of general applicability so that persons affected by such norms can know, without recourse to litigation, the content of their duties and rights.

'And the Section further recommends that a copy of this resolution be transmitted to the Ad Hoc Committee for the Code of Administrative Procedure for appropriate action.'"

of the Law School of the University of Michigan, and he would then become administrator of the American Bar Foundation.

Dean Stason then reported on the status of the proposed revision of the Model State Administrative Procedure Act. He stated that the first draft of the Model State Act was made in 1939-1940; that there have been many, many drafts since that time, the last of which had been presented to the National Conference of Commissioners on State Laws the previous week; that after the draft had been gone over line by line, the National Conference referred the matter back to the drafting committee for further study and development during the coming year; that the drafting committee will await a transcript of the National Conference proceedings before preparing revisions. Dean Stason further stated that such revisions as are made will be sent to Mr. Kirgis and his committee, as well as others, for comment.

Bryce Rea, chairman of the National Committee, reported on his correspondence and conversations with Mr. Richter, president of the National Conference of Commissioners on Uniform State Laws, and expressed the view that it is highly desirable that this Section achieve concrete recommendations, if possible, and secure approval of the House of Delegates; that the position of the ABA can count effectively only if it can be brought together and a united position presented to the National Conference. Mr. Kintner expressed the view that the matter might involve protocol. Dean Stason stated that the National Conference would welcome suggestions, either on a formal or an informal basis; that the task of getting consensus would be great. Dean Stason expressed the further view that some policy questions might well be given definite consideration, for example, rules of evidence; that if the Council should have a view on such a question, its view would be persuasive and he, with others, would be willing to shape up policy issues for consideration of the Council.

Mr. Berger commented that the National Conference of Commissioners on Uniform State Laws seems to have ignored experience in connection with Administrative Procedure Act and expressed the hope that policy differences will be resolved in pattern of ABA proposed code.

Ashley Sellers asked Dean Stason if the National Conference of Commissioners must secure approval of the House of Delegates. In reply, Dean Stason stated that, while some matters must be approved by the House of Delegates, such is not true of the Model

State Act. Mr. Sellers then questioned the feasibility of attempting to get concerted view and expressed the view that it would be better for the Section to take cognizance of draft and transmit views of the Section to National Conference of Commissioners; and stated there would be no impropriety involved in such procedure. Mr. Benjamin expressed agreement with Sellers' view and stated further that after National Conference has acted, the Section might then want to transmit views to the House of Delegates. J. Earl Cox expressed agreement with the viewpoint of Sellers and Benjamin and moved that the Section follow such procedure. In the discussion that followed, it appeared to be the sense of the Council that the Section's Committee on State Administrative Law should continue to study the Model Act and continue to cooperate with the National Conference of Commissioners on Uniform State Laws and that the committee keep the Council apprised of matters which require action. Mr. Kirgis then stated that there is no unanimity in the committee and so divergent views perhaps should be made available to the National Conference. It was then moved that a committee be appointed to draft and bring back to the Council for its consideration a resolution on the matter. The motion was duly seconded and adopted. Mr. Kintner thereupon appointed a drafting committee composed of Messrs. Cox, Kirgis and Cooper. The drafting committee thereafter reported with a resolution which was duly adopted.[2]

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[2] The text of such resolution reads as follows:

"The Council recommends to the Section the adoption of the following resolution:

'Be It Resolved, That the Committee on State Administrative Law of the Section be requested to continue its studies of the proposed revision of the Model State Administrative Procedure Act now under consideration by the National Conference of Commissioners on Uniform State Laws and to cooperate with the drafting committee of the National Conference thereon, making the views of the members of the Section Committee known to the drafting committee of the National Conference;

'And That, prior to the Midyear Meeting of the Association, the Section Committee on State Administrative Law advise the Council of any questions of policy as to which it is believed the views of the Council should be expressed so that the same may be considered by the Council at the Midyear Meeting of the Association;

'Further Resolved, That this Section invites the drafting committee of the National Conference of Commissioners on Uniform State Laws to refer to the Committee on State Administrative Law any specific questions on which the drafting committee desires advice.' "

3. National Committee

Bryce Rea, Jr., chairman of the committee, reported. He first referred briefly to the report of the committee, found at 12 Ad. Law Bull. 270-273, and then reported on testimony before the Senate Subcommittee, of which Senator Pastore is the chairman, which occurred after the report was made, namely, Senate hearing on Harris bill relating to "payola" and other matters. It is interesting to note that, while the ABA representatives who testified had been allotted only a few minutes, they were actually given more than an hour.

4. Communications Committee

Percy H. Russell, Jr., chairman of the committee, reported on its activities during the year. The report of the committee is found at 12 Ad. Law Bull. 207-220. He referred particularly to the resolution found on pages 207-208. Mr. Beeler thereupon moved that the Council recommend to the Section that it approve the resolution [3] with certain clarifying language in the resolution clauses.

[3] The resolution, as adopted, reads as follows:

"The Council recommends that the Section adopt the following resolution:

'Resolved, That the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

"WHEREAS, H.R. 8426, 86th Congress, 1st Session, would create (1) a Frequency Allocation Board responsible for the division of the radio frequency spectrum and use coordination between bands of frequencies available for assignment to Federal Government users and non-Federal Government users, and (2) a Government Frequency Administrator responsible for the assignment of frequencies available to Federal Government users, under the direction of the President; and

"WHEREAS, By the undefined and undifferentiating use of the term 'allocate,' H.R. 8426 fails to define the authority of the Frequency Allocation Board *vis-a-vis* the FCC and the Government Frequency Administrator; and

"WHEREAS, The non-applicability of the Administrative Procedure Act and the lack of alternative procedural safeguards, coupled with the lack of any standards or policy guidance concerning proper allocation of the spectrum, raise questions of the constitutionality of the delegation of such unlimited power to regulate this aspect of interstate and foreign commerce; and

"WHEREAS, Quite aside from any constitutional question, the total inapplicability of the Administrative Procedure Act disregards the cumulative experience of the Congress and of the bar that procedural safeguards should only sparingly be dispensed with and, then, only by particularized exemption specifically justified in each case; and

"WHEREAS, The apparent authorization to appropriate for Federal Government use frequencies already licensed by the FCC to private users during the term of the license, without prior notice, without hearing, and without judicial review, raises a serious question under the due process clause; and

"WHEREAS, H.R. 8426 fails to distinguish between regulatory procedures ap-

The motion was seconded by Whitney R. Harris and John W. Cragun and adopted.

5. *Labor Committee*

Milton Denbo, chairman of the committee, reported that the Section of Labor Relations Law had "suggested" that his committee take no action on certain matters and, in fact, the Labor Section had, in effect, suggested that his committee should go out of business, and had even gone so far as to take it up with the ABA Scope and Correlation of Work Committee; that apparently the Section had gotten no comfort from such committee; that it had been agreed that his committee would submit proposed reports to the Labor Section and the Labor Section would submit its proposed reports to the committee for consideration; and that, pursuant to such agreement, he had sent the report of his committee to the Labor Section, but had received no comment. He feels, however, that the Labor Section is considering Taft-Hartley amendments and other matters, but it has furnished nothing to his committee. Mr. Denbo said that when the matter was finally resolved, it was too late for any real work to be done by his committee. It was the consensus of the Council that Mr. Denbo was to be commended for his courage and good judgment exercised in this matter.

6. *Committee on Hearing Examiners*

Jesse E. Baskette, chairman of the committee, reported briefly on the written report of the committee, found at 12 Ad. Law Bull. 229-240. He also made reference to the splendid cooperation which existed between his committee and the Federal Trial Examiners Conforenced. The proposed resolution contained in the committee report, and found at page 229 of the Bulletin, relating to per diem allowances for travel and subsistence of Government employees, was discussed. Mr. Russell moved that the Council recommend to the Section the adoption of the resolution, as amended by striking therefrom the language "including Hearing

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propriate in emergencies and those appropriate in the regular course of things;

"*Be It Resolved,* That the American Bar Association is opposed to the enactment of H.R. 8426 of the 86th Congress, by reason of the procedural defects, deficiencies, and objections above recited; and

"*Resolved Further,* That the Section of Administrative Law be and it is hereby authorized to act for the Association in opposing the enactment of H.R. 8426, or any similar bill which may be subsequently introduced." ' "

Examiners of the Federal Government." This motion received no second. After an extended discussion of the jurisdictional question involved, Chairman Kintner stated the view that the action contemplated by the resolution is not within the jurisdiction of the Section. Mrs. Litvin, a vice-chairman of the committee, spoke in opposition to the resolution proposed by the committee and stated that, in her view, it would jeopardize over-all objectives. Mr. Beelar moved that the Council recommend to the Section that it *not* approve the resolution proposed by the Committee on Hearing Examiners relating to per diem allowances and found on page 229 of the Administrative Law Bulletin. The motion was seconded by Mr. Cragun and adopted.

7. *Immigration and Nationality Committee*

The report of the committee is found at 12 Ad. Law Bull. 242-253. No action was taken.

8. *Mobilization Committee*

The report of this committee was made orally by its chairman, Frank X. Brown. No recommendation was made and no action taken.

9. *Committee on Administrative Procedure Act*

Leo A. Huard, the chairman of this committee, referred to the report of the committee, found at 12 Ad. Law Bull. 177-179, and pointed out that such report recommended abolition of the committee. No action was taken.

10. *Budget and Finance Committee*

Herman Tocker, chairman of this committee reported briefly on the financial status of the Section. The report of this committee was received too late to be printed in the Bulletin. Copies of such report were circulated during the Annual Meeting and a copy is attached to the master copy of these minutes. Mr. Tocker suggested a letter to committee chairmen, requesting estimates for such expenditures as duplicating, telephone calls, etc. No action was taken on this suggestion. He pointed out that we operate financially on a fiscal year which is not the same as the official year and that late submission of statements of expenditures is to be avoided, if at all possible.

Mr. Tocker suggested that the Council authorize payment of the differential of $214.09 to Richard H. Keatinge, chairman of

the Aviation Committee. Upon a proper motion duly made, seconded and adopted, such reimbursement was directed.

After some discussion of the financial state of the Section and the desirability that the Committee Chairmen's Handbook be reprinted, Mr. Cragun moved that:

> "The By-Laws and Committee Chairmen's Handbook be updated and reprinted, including past resolutions on policy; and that the expense therefor be paid out of current funds, with the proviso that if there be a deficit at the end of the year, such deficit (Which will be paid out of the Reserve Fund) shall be charged to this project."

The motion was seconded by Mr. Beelar and duly adopted.

Mr. Kintner thereupon appointed a committee to edit and prepare the handbook and other data for the printer. The committee is composed of Donald C. Beelar, John W. Cragun, Whitney R. Harris and Earl W. Kintner.

11. *Committee on Agriculture*

Frank B. Lent, chairman of the committee, briefly commented on the report of the committee, found at 12 Ad. Law Bull. 192-195, and pointed out that no action was recommended. He also pointed out the dissent by Jesse E. Baskette, found on page 195 of the Bulletin.

12. *Aviation Committee*

The report of this committee is found at 12 Ad. Law Bull. 196-200. Richard H. Keatinge, chairman of the committee, reported that the work of the subcommittees on the Hector report is about four-fifths completed and it is hoped that the study of the full committee will get under way soon. The committee report contemplates action on two resolutions: (1) proposed formation of a Civil Aeronautics Board Practitioners' Association, similar to those in the ICC and FCC fields; and the other, (2) *ex parte* representations to administrative agencies, including the question of congressional appearances before administrative agencies.

Mr. Keatinge moved that the Section approve the proposed formation of a Civil Aeronautics Board Practitioners' Association as contemplated by the first resolution of the committee. The motion was seconded by Kenneth Teasdale. Mr. Beelar expressed concern about the proposal and questioned whether it is within the jurisdiction of the Section. He pointed out that the FCC

Bar Association was not sponsored by any Bar Association nor "mothered" by any other group. Mr. Cragun also expressed concern and pointed out that the Association has a Standing Committee on Aviation and believes the matter should be referred to such committee. Mr. Keatinge commented that the committee wants to "get the show on the road" and that Section approval would be helpful. John Donelan expressed the view that the ICC Practitioners' Association has been a force for good in improving procedures before that agency. Frank Stone stated that the matter came before the Civil Aeronautics Board in 1955 and 1956, but the Board has not formally acted on the matter and apparently the practitioners could not get together; that while he does not purport to speak for the CAB, he feels the Board would look with favor on such a Bar Association and that it could be helpful in many respects.

Mr. Cragun expressed concern as to the jurisdiction. Mr. Russell stated that he had no such fear. In response to a question from Mr. Harris, Mr. Keatinge stated that it was contemplated that only members of the Bar would be members of the Association. Mr. Stone then pointed out that non-members of the Bar may practice before the CAB. Mr. Harris expressed the view that coordination with the Standing Committee is mandatory. Mr. Keatinge reiterated that it is important to "get the show on the road." After some further discussion, a substitute motion proposed by Harold Russell was duly seconded and adopted.[4]

Mr. Keatinge then spoke with respect to the second proposal of the Aviation Law Committee, which relates to *ex parte* representations to agencies, including congressional appearances before such agencies. Mr. Beelar requested that *ex parte* representations and congressional appearances at oral arguments be handled separately. After some discussion, Mr. Stephan moved that such resolution, insofar as it relates to *ex parte* representations to agencies, be tabled. The motion to table was duly seconded and adopted.

Mr. Keatinge then moved that the Council recommend to the Section the adoption of the resolution relative to congressional

[4] The motion, as adopted, reads as follows:

"The Council recommends to the Section the adoption of the following resolution:

'*Resolved,* That the Section of Administrative Law looks with favor upon the formation of a Civil Aeronautics Board Bar Association and commends the Aviation Law Committee for its activity and report on this matter.' "

appearances at oral arguments. This motion was seconded by Mr. Beelar. Mr. Beelar expressed the view that the matter of congressional appearances at oral arguments before agencies should have early consideration of the Section and that a waiver should be obtained in order to have early consideration by the House of Delegates. Mr. Kintner thereupon appointed a committee to draft a text of the motion. The committee consisted of Harold Russell, chairman, Richard Keatinge, Courts Oulahan, Donald C. Beelar and Cornelius Peck. The committee reported back to the Council with its proposed resolution.

On behalf of the drafting committee, Mr. Beelar moved the adoption of the resolution drafted by the committee. The motion was seconded by Mr. Russell and adopted.[5] In the discussion on the resolution, Mr. Stone referred to a rule revision now under consideration by the Civil Aeronautics Board and expressed the view that the proposed resolution would be helpful in support of the "new thinking" on the Board. Mr. Lee inquired whether the

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[5] The resolution adopted under this motion reads as follows:

"The Council of the Administrative Law Section, upon consideration of the Report of the Aviation Committee, 12 Ad. Law Bull. 196, recommends to the Section the adoption of the following resolution:

'The Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

"WHEREAS, The Section of Administrative Law has further studied the problem of facilitating the orderly conduct of oral argument before agencies on the review of trial examiner reports in cases of adjudication by limiting the participation in the oral argument phase of agency proceedngs to those persons who appear as counsel of record;

"WHEREAS, The problem above stated is understood to be one that is prevalent to a substantial extent in the oral argument of cases before the Civil Aeronautics Board, and that agency is presently considering a revision of its rules of practice designed to effect the orderly, fair and expeditious conduct of hearings before the Civil Aeronautics Board including the oral argument of cases;

"Resolved, That it is the view of the American Bar Association that, as a general principle in the fair conduct of cases determining the rights of parties in particular proceedings, the opportunity for oral argument of cases on review of exceptions to trial examiner initial decisions should be limited to attorneys whose appearances on behalf of parties are of record in the proceeding.

"Resolved Further, That the Section of Administrative Law be and is hereby authorized to act for and on behalf of the Association in urging the adoption of rules of practice in conformance with the above stated principle.

"It Is Further Moved, By the Section of Administrative Law that the officers of this Section are requested to use their best efforts to obtain an appropriate waiver for the consideration and action of the House of Delegates on the above stated resolution at this annual meeting of the Association." ' "

resolution is limited to the CAB and was advised that, although the applicability is not limited to CAB, the present thrust is. Mr. Lee then stated that the same problem exists before other agencies; that it is a general problem and the action should not be limited to one agency. Mr. Beelar agreed that the general principle could apply across the board but that the practice is most evident at the CAB and the resolution would stop its spread to other agencies. Mr. Stephan inquired about practice at the ICC and the FCC and was advised that such practice did not generally obtain at those agencies. John Mitchell inquired what was meant by "attorney of record." Mr. Cragun defined it as meaning counsel appearing for a party. To meet the point raised by Mr. Lee, Mr. Beelar, with the consent of his second, agreed to amend the resolution by the addition of the words "as a general principle" in the first "Resolved" paragraph. Mr. Lee then inquired whether the resolution is limited to adjudicatory proceedings and stated that he hopes it is not, that some rule-making proceedings should be covered. Mr. Beelar said it is limited to adjudicatory proceedings, but that does not mean other proceedings could not be considered later. Mr. Beelar expressed the view that hearing examiners do not hear rule-making proceedings and Mr. Lee expressed disagreement with that, stating that hearing examiners in some agencies do hear rule-making proceedings. Mr. Russell expressed agreement with Mr. Lee. The motion, as amended, was adopted.

13. *Committee on Code of Agency-Tribunal Standards of Conduct*

Cornelius J. Peck, chairman of the committee, commented briefly on the report, found at 12 Ad. Law Bull. 201-206. He expressed the view that, if the purpose of the committee is not to redraft legislation, then its work may well be assigned elsewhere. Mr. Peck first stated that no action is required by the report of his committee. However, his attention was called to the fact that the report does contain a recommendation.

After some discussion, it was moved and seconded that the Council recommend to the Section that no action be taken relative to the recommendation of the committee that the draft of legislation attached to the report be approved. This motion was adopted.

14. *Committee on Organization and By-Laws*

Louisa Wilson, chairman of the committee, referred to the report of the committee, found at 12 Ad. Law Bull. 295 and pre-

sented a supplemental report of her committee which recommends the reorganization of the committees of the Section, copy of which is attached to the master copy of these minutes. Miss Wilson moved the adoption of the recommendation of her committee and the motion was seconded by several members of the Council. In the discussion which ensued, Mr. Cragun questioned the abolition of the Committee on Improvement of Administrative Procedure and the Committee on the Administrative Procedure Act. Mr. Harris replied that the new Committee on "Administrative Process" takes over the jurisdiction of the two committees. After some further discussion, the motion was adopted.

15. *Securities Committee*

C. Roger Nelson, chairman of the committee, referred to the report of the committee, found at 12 Ad. Law Bull. 299-309, and stated that no action is required by such report. He also reported on legislative matters with which the committee has been concerned during the past year and reported that no action was required.

16. *Interstate Commerce Act Committee*

Harry J. Breithaupt, chairman of this committee, referred to the report of the committee, found at 12 Ad. Law Bull. 261-262, and pointed out that action was required on the report. He thereupon moved that the Council recommend that the Section take appropriate action expressing the opposition to the proposal incorporated in H.R. 11411. The motion was seconded by Mr. Lee. After some discussion, the motion was adopted,[6] with Mr. Cragun abstaining.

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[6] The text of the resolution, as adopted, reads as follows:

"The Council recommends to the Section the adoption of the following resolution:

'*Resolved,* That the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

"*Resolution*

"WHEREAS, H.R. 11411 (86th Congress) would amend the Legislative Reorganization Act of 1946 to authorize the review of administrative regulations by committees of Congress prior to their promulgation; and

"WHEREAS, Enactment of such legislation would be disruptive of the federal administrative process and would serve to thwart one of the very purposes for which administrative agencies are created by unduly and unnecessarily circumscribing them in the exercise of their delegated rule-making powers; and

"WHEREAS, Enactment of such legislation would not only encumber the administrative process but would also likely lead to a weakening of the

17. *Administrative Law Bulletin*

Victor G. Rosenblum, editor-in-chief of the Bulletin, moved that the name of the publication be changed to "Journal" or "Review." The motion was seconded by Mr. Stephan and adopted.

18. *Maritime Transportation Committee*

John F. Donelan, chairman of the committee, referred to the report of such committee, found at 12 Ad. Law Bull. 267-268, and pointed out that no action is required. He also referred briefly to Senator Case's bill, which proposes to set up a new transportation department.

19. *Public Information Committee*

John J. Mitchell made a brief oral report. It is his belief that this is a year in which the committee has properly remained somewhat dormant.

20. *Public Contracts Committee*

Gilbert A. Cuneo, chairman of the committee, referred to the report of such committee, set forth at 12 Ad. Law Bull. 297-298. He reported that his committee has a regularly scheduled monthly meeting and is presently engaged in the study of drafting a uniform set of rules for matters within the purview of the committee.

21. *Regional Meetings Committee*

Whitney R. Harris reported for Jack Binion, co-chairman of Regional Meetings Committee, and gave a preview of the program for the Houston Regional Meeting to be held in November.

22. *Junior Bar Conference*

James J. Bierbower, chairman of the committee, referred to the written report of the committee, found at 12 Ad. Law Bull. 241. No action was recommended in the report. Mr. Bierbower's comment on the increased interest of Junior Bar members in the Administrative Law Section is most gratifying.

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independence of administrative agencies and, further, would likely lead to *ex parte* representations and the exercise of political pressures at the level of Congressional committee review:

"*Now, Therefore, Be It Resolved,* That the American Bar Association opposes enactment of H.R. 11411 (86th Congress) or any other legislation of that character calling for or authorizing Congressional review of the administrative regulations of federal administrative agencies prior to their promulgation.'"

23. *Membership Committee*

Mark Martin, chairman of the committee, referred to the report of the committee, which is found at 12 Ad. Law Bull. 269. Mr. Kintner announced that he, as Section Chairman, had sent out 7,500 invitations to new ABA members, inviting them to join the Section of Administrative Law.

V. Miscellaneous

1. *NLRB Proposed Rules Changes*

Valentine B. Deale referred to the proposed changes in the NLRB rules and suggested that the Labor Committee should give serious consideration to the proposed new rules. Al Sommers expressed the view that the Agency Rule Making Committee is also interested in such proposed rules. Mr. Kintner referred the proposed changes in the NLRB rules to the Labor Committee and to the Agency Rule Making Committee and directed Mr. Deale to deliver copies to such committees.

2. *Bibliography Project*

Frank C. Newman distributed a draft of "Lawyer's Guide to Federal Administrative Agencies—a Reference Manual for Practitioners." A copy of such document is attached to the master copy of these minutes.

The Council meeting thereupon adjourned at 1:40 p.m.

Elizabeth C. Smith, *Secretary*

MINUTES OF THE ANNUAL MEETING OF THE SECTION

WILLARD HOTEL—WASHINGTON, D. C.
AUGUST 29-30, 1960

The Annual Meeting of the Section of Administrative Law convened at 10 a.m., on Monday, August 29, in the South Ballroom, Willard Hotel, and adjourned at 5:00 p.m. on Tuesday, August 30, 1960. About 200 members attended various sessions of the meeting of the Section during the two days.

I. AGENDA

The agenda, as approved by the Council, was distributed. A copy of the agenda is attached to the master copy of these minutes.

II. NOMINATIONS

Fanney N. Litvin, chairman of the Nominating Committee,[1] pursuant to the provisions of the By-Laws of the Section, orally presented the report of the committee, which had already been published in the Spring-Summer Issue (1960) of the Administrative Law Bulletin (12 Ad. Law Bull. 291-294). Chairman Kintner then announced that opportunity for additional nominations would be given at the conclusion of the panel discussion scheduled for the morning meeting.

Pursuant to such announcement, and immediately preceding adjournment of the morning session, the meeting was opened for nominations from the floor. No nominations were made from the floor.

III. PROGRAM SESSIONS

The first session of the Annual Meeting of the Section was held on Monday morning rather than the afternoon, as is usually the case, because of the change in the time of the first session of the Assembly of the Association. The session on Monday morning was devoted to a panel discussion on "Administrative Law Devel-

[1] The members of the Nominating Committee appointed by the Chairman of the Section and announced in the Winter Issue (1959-60) of the Administrative Law Bulletin (12 Ad. Law Bull. 144) are Fanney N. Litvin, Chairman, Richard S. Doyle and Charles E. Long, Jr.

opments Around the World." This was moderated by Honorable E. Barrett Prettyman, Chief Judge, United States Court of Appeals for the District of Columbia, who made a short preliminary statement, during the course of which he announced that The President had asked him to be the temporary chairman of a new Conference on Administrative Practice and Procedure. The panel members were: Honorable Oren Harris, Member of Congress, Fourth District of Arkansas, and Chairman of the Committee on Interstate and Foreign Commerce; Dr. L. C. Cha, Vice Minister of Justice, China; Dr. H. W. R. Wade, Barrister, Fellow of Trinity College, Cambridge University; and Honorable James M. Landis, former dean of Harvard Law School, former Chairman of several Federal Regulatory Agencies, and now in private practice.

On Tuesday afternoon the Honorable Tom C. Clark, Associate Justice, Supreme Court of the United States, delivered a most informative and interesting address on the subject of "Administrative Justice, 1960."

The text of the prepared remarks of the speakers are to be published in an early issue of the Section's Administrative Law Review.

IV. Minutes

Upon motion duly made, seconded, and adopted, the Minutes of the 1959 Annual Meeting held in Miami Beach, Florida, were approved as distributed.

V. Committee Reports

1. *Agriculture*

Frank B. Lent, chairman of the committee, reported briefly on the work of his committee and referred to the report of the committee, found at 12 Ad. Law Bull. 192-195. He also noted that Jesse E. Baskette, a member of the committee, did not agree with a portion of the report and such dissent is shown in the written report of the committee. Mr. Baskette stated that he has a high view of the Department of Agriculture as a whole, but that it is his firm opinion that Hearing Examiners should have more independence and not more supervision.

2. *Aviation*

Richard H. Keatinge, chairman of the committee, referred to the report of the committee, found at 12 Ad. Law Bull. 196-200.

Donald C. Beelar moved the adoption by the Section of the resolution previously approved by the Council relating to participation in oral argument before agencies, particularly the CAB, by other than parties. The motion was seconded by Harold L. Russell and adopted.[2]

Mr. Keatinge reported that a study of the Hector report by subcommittees of the committee is under way and will be the subject of further reports.

Mr. Keatinge then moved the adoption of the resolution [3] relating to formation of the Civil Aeronautics Bar Association which had been approved by the Council. The motion was seconded by John Donelan. Stuart Russell questioned whether it is intended to exclude non-lawyers from membership and Mr. Keatinge replied that the resolution, as drawn, contemplated only lawyer members. Mr. Stone reported that, while such practice is permitted, he knew of no non-lawyers who now practice before the CAB. Reuben Hall expressed opposition to the resolution, as did Stuart Russell. Mr. Keatinge explained that an organization

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[2] This action was taken by the Section immediately prior to the panel discussion on Monday morning. The text of the resolution, so adopted, reads as follows:

"The Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

'WHEREAS, The Section of Administrative Law has further studied the problem of facilitating the orderly conduct of oral argument before agencies on the review of trial examiner reports in cases of adjudication by limiting the participation in the oral argument phase of agency proceedings to those persons who appear as counsel of record;

'WHEREAS, The problem above stated is understood to be one that is prevalent to a substantial extent in the oral argument of cases before the Civil Aeronautics Board, and that agency is presently considering a revision of its rules of practice designed to effect the orderly, fair and expeditious conduct of hearings before the Civil Aeronautics Board including the oral argument of cases;

'*Resolved,* That it is the view of the American Bar Association that, as a general principle in the fair conduct of cases determining the rights of parties in particular proceedings, the opportunity for oral argument of cases on review of exceptions to trial examiner initial decisions should be limited to attorneys whose appearances on behalf of parties are of record in the proceeding.

'*Resolved Further,* That the Section of Administrative Law be and is hereby authorized to act for and on behalf of the Association in urging the adoption of rules of practice in conformance with the above stated principle.

"*It Is Further Moved,* By the Section of Administrative Law that the officers of this Section are requested to use their best efforts to obtain an appropriate waiver for the consideration and action of the House of Delegates on the above stated resolution at this annual meeting of the Association.'"

[3] The text of the resolution, as approved by the Council, is found in the minutes of the Council Meeting.

similar to the Federal Communications Bar Association and the ICC group was contemplated and that a group had been named to present the matter to the CAB. Reuben Hall expressed the view that it is none of the business of this Section; that, if a group wants to form a bar association to practice before any agency, it is their own business. The question of the effect on the Standing Committee on Aviation Law was raised and Mr. Keatinge stated that there is no intention of undercutting that committee. Mr. Beelar expressed the view that there is more than one question involved: first, should there be an organized bar at the CAB and, second, what should this Section do about it. He pointed out that in no instance has this Section ever opposed or blest such an organization; and that he is disturbed about the use of the Section in the matter; that while he is in favor of the organization, he does not favor action by the Section. Raoul Berger expressed agreement with Mr. Beelar. J. Earl Cox stated that he sees no reason why a voluntary organization should not be effected, but opposed the resolution. Franklin Stone stated he feels that the Board is willing to cooperate and also feels such an organization would be helpful in some respects. Whitney Harris summarized the sense of the meeting to be that, while the proposed organization is a good idea, there is a serious question as to whether the Section, as a matter of policy, should endorse it. Mr. Harris, then presiding as chairman, asked for a vote on the question of whether, as a matter of principle, the Section should involve itself in this matter. The ensuing vote was preponderantly in the negative. The effect of the vote was to table the Keatinge motion.

3. Communications

Percy H. Russell, Jr., chairman of the committee, referred to the report of his committee, found at 12 Ad. Law Bull. 207-200, commenting specifically on two matters: (1) counter proposals in rule making proceedings and (2) frequency allocation board. Mr. Russell then moved that the Section go on record as opposing H.R. 8426. This action had been recommended by the Council. The motion was seconded by Mr. Berger and adopted.[4]

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[4] The resolution, as adopted by the Section pursuant to such motion, reads as follows:

"*Resolved,* That the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

'WHEREAS, H.R. 8426, 86th Congress, 1st Session would create (1) a Frequency

4. *Hearing Examiners*

Jesse E. Baskette, chairman of the committee, referred to the report, found at 12 Ad. Law Bull. 229-240. He moved the adoption of the resolution, found in the report of the Committee on Hearing Examiners at 12 Ad. Law Bull. 229, dealing with per diem allowances for travel and subsistence. The motion was seconded. After the subject matter had been discussed at length, Mr. Harris, then presiding as chairman, asked for a vote on whether the subject matter was a matter upon which the Section should take action. The ensuing vote was preponderantly in the negative. This action had the effect of tabling the Baskette motion.

Abe McGregor Goff, a member of the Interstate Commerce Commission, spoke relative to that portion of the report of the Committee on Hearing Examiners dealing with the ICC, found at 12 Ad. Law Bull. 235-237. Commissioner Goff stated that he has the highest opinion of Hearing Examiners and reminded that the ICC has more of them than any other agency. He dealt at some

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Allocation Board responsible for the division of the radio frequency spectrum and use coordination between bands of frequencies available for assignment to Federal Government users and non-Federal Government users, and (2) a Government Frequency Administrator responsible for the assignment of frequencies available to Federal Government users, under the direction of the President; and

'WHEREAS, By the undefined and undifferentiating use of the term "allocate," H.R. 8426 fails to define the authority of the Frequency Allocation Board *vis-a-vis* the FCC and the Government Frequency Administrator; and

'WHEREAS, The non-applicability of the Administrative Procedure Act and the lack of alternative procedural safeguards, coupled with the lack of any standards or policy guidance concerning proper allocation of the spectrum, raise questions of the constitutionality of the delegation of such unlimited power to regulate this aspect of interstate and foreign commerce; and

'WHEREAS, Quite aside from any constitutional question, the total inapplicability of the Administrative Procedure Act disregards the cumulative experience of the Congress and of the bar that procedural safeguards should only sparingly be dispensed with and, then, only by particularized exemption specifically justified in each case; and

'WHEREAS, The apparent authorization to appropriate for Federal Government use frequencies already licensed by the FCC to private users during the term of the license, without prior notice, without hearing, and without judicial review, raises a serious question under the due process clause; and

'WHEREAS, H.R. 8426 fails to distinguish between regulatory procedures appropriate in emergencies and those appropriate in the regular course of things;

'Be It Resolved, That the American Bar Association is opposed to the enactment of H.R. 8426 of the 86th Congress, by reason of the procedural defects, deficiencies, and objections above recited; and

'Resolved Further, That the Section of Administrative Law be and it is hereby authorized to act for the Association in opposing the enactment of H.R. 8426, or any similar bill which may be subsequently introduced.' "

length with what he termed criticism of the ICC on two grounds: (1) memorandum of the ICC addressed to its Hearing Examiners and attorney-advisers and (2) the work report. He stated that the attendant national publicity was not at the behest of the ICC and that, furthermore, in his opinion that agency has administrative problems which differ from those of any other agency. He also expressed the view that the committee report should have been discussed with the ICC. Chairman Kintner asked Commissioner Goff to present his views in writing for publication in the Bulletin and commended Mr. Baskette for his diligence and hard work on the committee.

Henry Sahm, president of the Federal Trial Examiners Conference, which has as members more than 300 of the 400 Hearing Examiners in the Federal Government, expressed appreciation for the cooperation which the Conference has had from the Hearing Examiners Committee. Mr. Kintner expressed the view that the Hearing Examiner "problem" lies at the heart of administrative procedure.

Albert E. Stephan expressed the view that the committee report is unfair to the Interstate Commerce Commission and that, while he respects the work of the committee generally, he "deplores inference contained in the report against the ICC." Mr. Stephan the moved that the Section express regret at any inference contained in the Hearing Examiner report, at page 235 of the Bulletin, and endorse action of ICC or any other agency which seeks to lay down standards of conduct for Hearing Examiners. The motion was seconded. Mr. Baskette pointed out that there was no intention whatsoever to discourage efforts to raise ethics on all levels, but that it should be done in such a way as not to reflect on all Hearing Examiners. He also stated that there was no willful overlooking of discussion with Commissioner Goff, but that it did not occur to him to do so. Bryce Rea stated that he knows of no interference with the independence of Hearing Examiners by the ICC and reported that in a recent case in which certain improprieties were charged against a Hearing Examiner, the Commission investigated the matter, found the charges groundless and had under consideration the discipline of the practitioner who brought the charges. He further stated that the purpose of a report is to bring the views of the committee to the Section and that it would set a dangerous precedent to "deplore" or to strike part of the report. Charles W. Bucy offered as a substitute motion that the Section

go on record as establishing the policy for the future that committee chairmen check with agency under consideration before report is written. This received no second. Fanney N. Litvin stated that she saw the report and approved of it and did not believe it was unfairly critical of the agency. Mr. Rea thereupon moved to table the Stephan motion. The motion was seconded by Mr. Beelar and approved.

Joe Zwerdling expressed the view that the new Conference on Administrative Practice and Procedure should not be considered as a substitute for the independent office contemplated in S. 600. Mr. Kintner reminded that the American Bar Association is on record as approving an independent office and stated that he has testified in support thereof; and that he has also helped lay the groundwork for the new President's Conference.

5. *Organization and By-Laws*

Louisa Wilson, chairman of the committee, referred briefly to the report of the committee, found at 12 Ad. Law Bull. 295, which required no action. She then presented the supplemental report of the committee for reorganization of the committee structure of the Section, which had been approved by the Council and distributed in the meeting. She thereupon moved that the Section affirm approval of the reorganization as set forth in the supplemental report. The motion was seconded by Reuben Hall and adopted. A copy of the supplemental report is attached to the master copy of these minutes.

6. *National Committee*

Bryce Rea, Jr., chairman of this committee, referred to the written report of his committee, found at 12 Ad. Law Bull. 270-278, and briefly commented thereon.

7. *Agency Rule Making*

Victor G. Rosenblum, chairman of the committee, referred to the report of the committee, found at 12 Ad. Law Bull. 180-191, and commented briefly thereon. He then moved the adoption of the resolution which had been approved by the Council. The motion was seconded by Mr. Beelar and adopted.

8. *Administrative Law Bulletin*

Victor G. Rosenblum, editor-in-chief of the Administrative Law Bulletin, moved that the name of the publication be changed

from "Bulletin" to "Journal" or "Review." The motion was seconded and adopted.

9. *Maritime and Transportation*

John F. Donelan, chairman of the committee, referred to the written report of his committee, found at 12 Ad. Law Bull. 267-268. The report required no action.

10. *Federal Register*

J. Earl Cox, in the absence of the chairman, Alvis Layne, Jr., reported briefly on the work of the committee and referred to its report, found at 12 Ad. Law Bull. 221-228. No action was required.

11. *Code of Agency-Tribunal Standards of Conduct*

Cornelius J. Peck, chairman of this committee, was not able to be present at the meeting of the Section. Reference was made to the report of the committee, found at 12 Ad. Law Bull. 201-206. No action was taken by the Section thereon. (See Minutes of the Council for action taken by the Council in connection therewith.) Professor Newman expressed his surprise at hearing an Interstate Commerce Commissioner state that a matter had been handled by an interoffice memorandum which, in Mr. Newman's opinion, was required to be published under the Administrative Procedure Act.

Donald C. Beelar moved that such committee be requested to submit a report to the Council—this fall, if possible—on the Harris bill, H.R. 12731 (86th Congress). This motion was seconded by Reuben Hall and adopted.

12. *Labor*

Milton C. Denbo, chairman of the committee, was not present. (See report, found at 12 Ad. Law Bull. 263-266.) It was announced by Section Chairman Kintner that the contention between the Section of Labor Relations Law and our Section's Labor Committee had been ironed out and that the "powers that be" had ruled with the Administrative Law Section in the controversy.

13. *Natural Resources and Interior Matters*

Robert L. McCarty, chairman of the committee, referred to the report of the committee, found at 12 Ad. Law Bull. 279-290. Mr. McCarty pointed out that his committee dealt mainly with

the Department of the Interior and that many of its activities are outside the pale of the Administrative Procedure Act.

14. *Budget and Finance*

Herman Tocker, chairman of the committee, reported that the fiscal affairs of the Section are in excellent condition. He reminded that our fiscal year ends on June 30th and emphasized the necessity of getting current bills in before such date; otherwise, funds are lost through reversion to the ABA general fund, which results not only in a substantial loss of funds but may affect the amount of future appropriations from the Association. A copy of the report of the committee, which was distributed at the meeting, is attached to the master copy of these minutes.

15. *Securities*

C. Roger Nelson, chairman of the committee, referred to the written report of his committee, found at 12 Ad. Law Bull. 299-309. No action thereon was required.

16. *Interstate Commerce Act*

Harry J. Breithaupt, chairman of the committee, reported for the committee and referred to the written report, found at 12 Ad. Law Bull. 261-262. Mr. Breithaupt then moved the adoption of resolution relative to H.R. 11411 (86th Congress), which had been approved by the Council. The motion was seconded. After an extended general discussion, Valentine B. Deale moved to table the resolution. The motion to table was seconded by Victor Rosenblum and, when put to a vote, failed of adoption.

Donald C. Beelar moved to delete the second and third "Whereas" clauses and suggested use of the matter contained therein as reasons in support of adoption of the resolution by the House of Delegates. The Beelar motion was seconded by John B. Gage and adopted. After further discussion (including consideration of several motions which were not adopted), the resolution, as amended, was adopted.[5] The committee was directed to furnish,

[5] The text of the resolution, as adopted, reads as follows:

"*Resolved,* That the Section of Administrative Law recommends that the House of Delegates adopt the following resolution:

'WHEREAS, H.R. 11411 (86th Congress) would amend the Legislative Reorganization Act of 1946 to require the submission of administrative regulations for review by committees of Congress as a prerequisite to their promulgation;

"*Now, Therefore, Be It Resolved,* That the American Bar Association opposes enactment of H.R. 11411 (86th Congress) or any other similar legislation

before the Midyear Meeting, a draft of supporting reasons for adoption of the resolution by the House of Delegates. Valentine B. Deale, as vice chairman of the Ad Hoc Committee on Federal Administrative Practice Act, requested that the supporting data for the adoption of this resolution by the House of Delegates be coordinated with his committee and it was agreed that this would be done.

17. *State Administrative Law*

Frederic L. Kirgis, chairman of the committee, briefly commented on the report of the committee, found at 12 Ad. Law Bull. 310-311. He then moved that the Section adopt resolution passed by the Council relating to participation by his committee in the proposed revision of the Model State Administrative Procedure Act now under consideration by the National Conference of Commissioners on Uniform State Laws. The motion was seconded by Jesse E. Baskette and adopted.

18. *Other Committees*

Several committee chairmen were not present but the written reports of many of the committees are found in the 1960 Spring-Summer Issue of the Bulletin.

VI. Election of Officers and Council Members

Fanney N. Litvin, chairman of the Nominating Committee, moved that the Secretary be instructed to cast a unanimous ballot for each of the officers and Council members named in the report of the Nominating Committee and that they be declared the duly elected officers and Council members for the terms indicated. The motion was seconded and adopted. The officers and Council members so elected are as follows:

Chairman: Whitney R. Harris, Dallas, Texas
Vice-Chairman: Raoul Berger, Washington, D. C.
Secretary: Elizabeth C. Smith, Washington, D. C.
Delegate to the House of Delegates: Donald C. Beelar, Washington, D. C.

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calling for or requiring Congressional review of the administrative regulations of federal administrative agencies as a prerequisite to their promulgation.

'*Resolved Further,* That the Section of Administrative Law be and is hereby authorized to act for and on behalf of the Association in opposing such legislation.' "

Council Members (three-year terms, each):

John B. Gage, Kansas City, Missouri
J. Earl Cox, Washington, D. C.
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